No. 893



# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1956

~~No. 563 Misc.~~

CARYL CHESSMAN,
*Petitioner,*

vs.

HARLEY O. TEETS, Warden, California State Prison, San Quentin, California,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

GEORGE T. DAVIS,
98 Post Street, San Francisco 4, California;
*Attorney for Petitioner.*

CARYL CHESSMAN,
Box 66565, San Quentin, California,
*Petitioner pro se,*

ROSALIE S. ASHER,
County Court House, Sacramento, California,
*Of Counsel.*

## Subject Index


Page

Petition for a Writ of Certiorari:

Reference to reported opinions ..... 2

Jurisdictional statement ..... 4

Questions presented for review ..... 6

Constitutional and statutory provisions involved ..... 8

Statement of the case ..... 14

A. History of the instant litigation ..... 14

B. Proceedings in the State Courts relative to the preparation, settlement and acceptance of the reporter's transcript ..... 28

C. The District Court hearing: The manner in which it was conducted by Judge Goodman; what was proved and what was not permitted to be proved ..... 36

Reasons for granting the writ ..... 46

Conclusion and prayer for writ ..... 72

Appendix:

Judge Hamley's October 18, 1956 affirming opinion (concurred in by Judge Lemmon) ..... i

Chief Judge Denman's October 18, 1956 dissenting opinion..xviii

Chief Judge Denman's November 20, 1956 opinion dissenting from denial of rehearing..... xxv

Judge Lemmon's November 27, 1956 memorandum in connection with the denial of the petition for rehearing ..... xxvi

Chief Judge Denman's November 28, 1956 answering memorandum as amended by order of December 13, 1956 ..... xxix

## Table of Authorities Cited


| Cases | Pages |
|---|---|
| Adams v. United States, 317 U.S. 269 | 65, 66 |
| Application of Chessman (1955), 219 F.2d 162 | 3, 15, 16 |
| Beauharnais v. Illinois, 343 U.S. 250 | 46 |
| Berger v. United States, 255 U.S. 22 | 59 |
| Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 | 53 |
| Brown v. Allen, 344 U.S. 443 | 50, 56 |
| Buchalter v. New York, 319 U.S. 427 | 50 |
| Chessman v. California et al. (1950), No. 98 Misc., Oct. Term, 1950, certiorari denied October 9, 1950, 340 U.S. 840 | 4 |
| Chessman v. California (1951), No. 442 Misc., Oct. Term, 1950, certiorari denied May 14, 1951, 341 U.S. 929 | 4 |
| Chessman v. California (1952), No. 371 Misc., Oct. Term, 1951, certiorari denied March 31, 1952, 343 U.S. 915; rehearing denied April 28, 1952, 343 U.S. 937 | 4 |
| Chessman v. California (1953), No. 239 Misc., Oct. Term, 1953, certiorari denied December 14, 1953, 346 U.S. 916; rehearing denied February 1, 1954, 347 U.S. 908 | 4 |
| Chessman v. California (1953), 205 F.2d 128 | 2 |
| Chessman v. Teets (1955), 221 F.2d 276 | 3, 15 |
| Chessman v. Teets, 138 F.Supp. 761 | 2, 5, 24 |
| Chessman v. Teets, 348 U.S. 864 | 4, 5, 14 |
| Chessman v. Teets, 350 U.S. 3 | 4, 5, 16 |
| In re Albori, 95 Cal.App. 42 | 48 |
| In re Chessman (1954), 43 Cal.2d 296 (273 P.2d 263) | 2 |
| In re Chessman (1954), 43 Cal.2d 391 (274 P.2d 645) | 3 |
| In re Chessman (1954), 43 Cal.2d 408 (274 P.2d 655) | 3 |
| In re Chessman (1955), 128 F.Supp. 600 | 3, 15 |
| In re Chessman & People v. Superior Court (1955), 44 Cal. 2d 1 (279 P.2d 24) | 3 |
| Cochran v. Kansas, 316 U.S. 255 | 52 |
| Coplon v. United States (App. D.C.), 191 F.2d 749 | 66 |
| Cross v. Burke, 146 U.S. 82 | 69 |
| Dimmick v. Tompkins, 194 U.S. 540 | 52 |
| Dowd v. Cook, 340 U.S. 206 | 52 |
| Fisher ex rel. Barcelon v. Baker, 203 U.S. 174 | 69 |

| | Pages |
|---|---|
| Ex parte Hull, 312 U.S. 546 | 71 |
| Ex parte Tom Tong, 108 U.S. 556 | 69 |
| Gibbs v. Burke, 337 U.S. 773 | 55 |
| Griffin v. Illinois, 351 U.S. 12 | 52 |
| Hooven & Allison Co. v. Evatt, 324 U.S. 652 | 50 |
| Hebert v. Louisiana, 272 U.S. 312 | 50 |
| Hill v. Texas, 316 U.S. 400 | 58 |
| In re Hoge, 48 Cal. 3 | 48 |
| In re Murchinson, 349 U.S. 133 | 59 |
| Knapp v. Kinsey, 232 F.2d 458 | 59 |
| Kuhn v. Ferry & Hensler, 87 Cal.App.2d 812 | 48 |
| Louisville, etc. R. Co. v. Schmidt, 177 U.S. 230 | 53 |
| Louis. & Nash. R.R. v. Stock Yards Co., 212 U.S. 132 | 53 |
| Niemotko v. Maryland, 340 U.S. 268 | 50 |
| Norris v. Alabama, 294 U.S. 587 | 50 |
| Offutt v. United States, 348 U.S. 11 | 59 |
| People v. Bob, 29 Cal.2d 321 | 48 |
| People v. Chessman (1950), 35 Cal.2d 455 (218 P.2d 769, 19 A.L.R.2d 1084) | 2, 36 |
| People v. Chessman (1951), 38 Cal.2d 166 (238 P.2d 1001) | 2, 3, 36 |
| People v. Gilbert, 25 Cal.2d 422 | 49 |
| People v. Knowles (1950), 35 Cal.2d 175 (sub nom People v. Chessman, 217 P.2d 1 | 3 |
| People v. Superior Court & In re Chessman (1954), 273 P.2d 936 | 2 |
| Powell v. Alabama, 287 U.S. 45 | 66 |
| Price v. Johnson, 334 U.S. 266 | 50 |
| Reece v. Georgia, 350 U.S. 85 | 50 |
| Remmer v. United States, 350 U.S. 377 | 61 |
| Rice v. Sioux City Cemetery, 349 U.S. 70 | 69 |
| Roller v. Holly, 176 U.S. 398 | 53 |
| Saunders v. Shaw, 244 U.S. 317 | 54 |
| Simon v. Craft, 182 U.S. 427 | 53 |

Pages

U. S. ex rel. Elliott v. Hendricks, 213 F.2d 922 ..... 67

Watts v. Indiana, 338 U.S. 49 ..... 28
Wuest v. Wuest, 53 Cal.App.2d 339 ..... 48

Yick Wo v. Hopkins, 118 U.S. 356 ..... 52

## Constitutions

Constitution of California, Article VI, Section 4½ ..... 9, 49

Constitution of the United States:
Fourteenth Amendment ..... 5, 70, 71
Fourteenth Amendment, Sections 1 and 5 ..... 8

## Statutes

California Code of Civil Procedure, Section 953(e) ..... 11

California Penal Code:
Section 125 ..... 55
Section 209 ..... 3, 9, 10
Section 1239(b) ..... 10, 48
Section 2602 ..... 70
Section 2603 ..... 71
Section 2604 ..... 71

28 United States Code:
Section 144 ..... 8, 12, 17, 59
Section 455 ..... 60
Section 1254(1) ..... 4
Sections 1291, 1294(I) ..... 6
Section 1915 ..... 25
Section 2101(c) ..... 5
Section 2201 ..... 7, 12, 23, 69, 70, 72
Section 2202 ..... 7, 12, 23, 70, 72
Sections 2241, 2242 ..... 5
Section 2243 ..... 5, 13, 70
Section 2244 ..... 14, 50
Section 2250 ..... 14, 23, 67
Section 2253 ..... 5, 6
Section 2254 ..... 5

Stats. 1951, ch. 1749, p. 4167 ..... 3, 10

Pages

## Rules

California Rules on Appeal:
Rule 33(c) ..... 11, 48
Rule 35(b) ..... 11, 48
Rule 35(c) ..... 32

Federal Rules of Criminal Procedure, Rule 73 ..... 6

## Texts

Moore, Commentary on the U. S. Judicial Code (Matthew Bender & Co., 1949), p. 59, including footnotes 69-72 .... 69

## NOTE

The Transcript of Record from the District Court will be referred to as R. ....., Vol. I.

The Reporter's Transcript of the pre-trial proceedings (pre-trial record) will be referred to as PTR. ....., Vol. II or III.

The Reporter's Transcript of the hearings (hearing record) will be referred to as HR. ....., IV, V, VI, VII, VIII, IX, X or XI.

The Reporter's and Clerk's Transcripts on appeal to the California Supreme Court will be referred to as Rep. Tr. ..... and Cl. Tr. ____.

The original exhibits before the District Court will be referred to as Pet. Ex. ..... and Resp. Ex. .....

Unless otherwise indicated, emphasis has been added by Petitioner.

# In the Supreme Court

OF THE

# United States

---

OCTOBER TERM, 1956

---

No. ..... Misc.

---

CARYL CHESSMAN,

*Petitioner,*

vs.

HARLEY O. TEETS, Warden, California State Prison, San Quentin, California,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

---

The petition of Caryl Chessman (hereinafter called Petitioner) respectfully shows:

The United States District Court for the Northern District of California, Southern Division, discharged a writ of habeas corpus previously granted and remanded Petitioner to the custody of Respondent for execution. (R. 204-215, Vol. I.) Brought here for review is the bare two-to-one judgment, decision and opinion of the United States

Court of Appeals for the Ninth Circuit affirming the District Court's action. (R. 264-281, 286, Vol. I.)

---

**REFERENCE TO REPORTED OPINIONS.**

**[Rule 23-1(a).]**

*Chessman v. Teets* (1956), ..... F.2d ..... This is the opinion of the United States Court of Appeals, written by Judge Frederick G. Hamley and concurred in by Judge Dal M. Lemmon, here questioned. A copy of this opinion, the dissenting opinion of Chief Judge William Denman, as well as Judge Denman's dissenting opinion from the denial of rehearing, Judge Lemmon's memorandum opinion and the answering memorandum opinion of Judge Denman, are set out in the Appendix.

*Chessman v. Teets* (1956), 138 F.Supp. 761. This is the opinion of the United States District Court discharging the writ of habeas corpus previously granted and remanding Petitioner to the custody of Respondent for execution. It will be found at R. 204-215, Vol. I.

Earlier reported opinions, dealing with various aspects of the litigation, are:

*People v. Chessman* (1950), 35 Cal.2d 455 [218 P.2d 769, 19 A.L.R.2d 1084].

*People v. Chessman* (1951), 38 Cal.2d 166 [238 P.2d 1001].

*Chessman v. California* (1953), 205 F.2d 128.

*In re Chessman* (1954), 43 Cal.2d 296 [273 P.2d 263].

*People v. Superior Court & In re Chessman* (1954), 273 P.2d 936.

*In re Chessman* (1954), 43 Cal.2d 391 [274 P.2d 645].

*In re Chessman* (1954), 43 Cal.2d 408 [274 P.2d 655].

*In re Chessman* (1955), 128 F.Supp. 600.

*In re Chessman & People v. Superior Court* (1955), 44 Cal. 2d 1 [279 P.2d 24].

*Application of Chessman* (1955), 219 F.2d 162.

*Chessman v. Teets* (1955), 221 F.2d 276.

See also the companion case of an alleged and convicted confederate:

*People v. Knowles* (1950), 35 Cal.2d 175 [sub nom *People v. Chessman,* 217 P.2d 1]. This is the opinion and decision of the California Supreme Court construing § 209 of the California Penal Code under which Petitioner is sentenced twice to death and twice to life imprisonment. Here the state Supreme Court divided four to three, the bare majority holding that robbery *was* kidnaping and punishable as such. The 1951 Regular Session of the California Legislature repudiated this construction by amending the section and granting relief to everyone convicted under the section as it had read before amendment and who had been sentenced to life imprisonment without possibility of parole (Stats. 1951, ch. 1749, p. 4167). Yet Petitioner's conviction was allowed to stand (*People v. Chessman,* supra, 38 Cal.2d 166), although he then apparently was placed in the unique position of being twice sentenced to death for acts (regardless of by whom committed) no longer triable and punishable at all under the kidnaping statute.

The case has been before this Court on six previous occasions on certiorari:

1. *Chessman v. California et al.* (1950), No. 98 Misc., Oct. Term, 1950, certiorari denied October 9, 1950, 340 U.S. 840.

2. *Chessman v. California* (1951), No. 442 Misc., Oct. Term, 1950, certiorari denied May 14, 1951, 341 U.S. 929. A motion for leave to file an original petition for writ of habeas corpus was also denied.

3. *Chessman v. California* (1952), No. 371 Misc., Oct. Term, 1951, certiorari denied March 31, 1952, 343 U.S. 915; rehearing denied April 28, 1952, 343 U.S. 937.

4. *Chessman v. California* (1953), No. 239 Misc., Oct. Term, 1953, certiorari denied December 14, 1953, 346 U.S. 916; rehearing denied February 1, 1954, 347 U.S. 908.

5. *Chessman v. Teets* (1954), No. 285, Oct. Term, 1954, certiorari denied October 25, 1954, without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court, 348 U.S. 864.

6. *Chessman v. Teets* (1955), No. 196, Oct. Term, 1955, certiorari granted, Court of Appeals for Ninth Circuit reversed, and cause remanded to the District Court for a hearing, 350 U.S. 3.

---

## JURISDICTIONAL STATEMENT.

**[Rule 23-1(b).]**

Petitioner seeks and asks this Court to grant a writ of certiorari under 28 U.S.C. § 1254(1).

This petition for the writ is timely. It is being filed well within the ninety-day jurisdictional period required

by 28 U.S.C. § 2101(c), which would have expired February 18, 1957.

The Court of Appeals decided the case October 18, 1956 (R. 286, Vol. I), and denied a timely filed petition for rehearing November 20, 1956. (R. 287, Vol. I.)

Precedent jurisdiction was established as follows:

Jurisdiction of the District Court to entertain the petition was based upon the allegations of deprivation of constitutional rights under the Fourteenth Amendment by the Courts, agencies and agents of the State of California (28 U.S.C. §§ 2241, 2242, 2243), the exhaustion of Petitioner's remedies in the state Courts (28 U.S.C. § 2254), including application for and denial by this Court of a petition for writ of certiorari to the Supreme Court of California "without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court" (*Chessman v. Teets,* 348 U.S. 864), and this Court's subsequent holding, in granting certiorari, reversing the Court of Appeals and remanding the case to the District Court for a hearing, that Petitioner's charges, if sustained, set forth a denial of Due Process (*Chessman v. Teets,* 350 U.S. 3).

Jurisdiction was conferred on the Court of Appeals to review the order and judgment of the District Court (discharging the writ of habeas corpus previously granted and remanding Petitioner to custody: *Chessman v. Teets,* 138 F.Supp. 761) when that Court's Chief Judge granted a certificate of probable cause to appeal (28 U.S.C. § 2253; R. 252-254, Vol. I) and on the same date when Petitioner filed his second notice of appeal. (R. 255, Vol. I.) The

appeal was prosecuted under the provisions of 28 U.S.C. §§ 1291, 1294(1), 2253, and Rule 73, F.R.C.P.

---

## QUESTIONS PRESENTED FOR REVIEW.

**[Rule 23-1(c).]**

1. By the participation therein of Judge Dal M. Lemmon, was Petitioner deprived of an impartial determination of his appeal to the Court of Appeals, the decision and opinion of which are here brought for review? Specifically, does the memorandum opinion filed by Judge Lemmon a week after the denial of rehearing reveal such an extreme absence of judicial fairness, impartiality, restraint and objectivity on the part of Judge Lemmon that the appellate proceedings are shown to be prejudicially tainted and hence are a nullity?

2. Since Petitioner was not permitted to establish inadequacies and omissions in the disputed Reporter's Transcript in order to show convictions obtained in violation of fundamental constitutional rights, was not permitted to be present or represented by counsel at the proceedings to "settle" the transcript (or at any time), and was not permitted to produce witnesses, examine witnesses called or test the challenged ability of the substitute reporter to transcribe the dead reporter's shorthand notes, did the Courts of California deny to Petitioner due process and equal protection of the law in ordering prepared and causing to be prepared (not by any known law or rule but by "human ingenuity," under the unsupervised direction of the prosecutor by his uncle-in-law), and then settling and accepting for use on the *mandatory* appeal, such

a uniquely prepared Reporter's Transcript of the trial proceedings, used as a basis for affirming the death and other judgments, without giving Petitioner any opportunity to defend against that transcript?

3. Is the Court of Appeals in error in holding that Petitioner had no constitutional right to be personally present at the Los Angeles Superior Court trial to create and settle the record of what happened at the trial on the merits, although this Court specifically has held, as shown by Chief Judge William Denman in his dissenting opinions, that the due process guaranteed by the Fourteenth Amendment applied to that trial and was in force at all stages of the proceedings? That is, did the Superior Court's admitted refusal to produce Petitioner and permit him to participate in the trial to perfect the uniquely produced record deny him due process?

4. Was Petitioner prejudicially denied the full and fair hearing contemplated by this Court in its Per Curiam opinion and impliedly ordered by this Court in its mandate, and resultantly was Petitioner kept from conclusively proving his charges of fraud?

5. Did the District Court commit reversible error in ruling that, on jurisdictional grounds, it could not and would not declare Petitioner's rights under 28 U.S.C. §§ 2201 and 2202?

May a state, through one of its agencies, by administrative fiat, arbitrarily seize and deprive a citizen of his property? Similarly, may a state forcibly deny to any citizen the right to speak freely and to publish his sentiments on any subject, when that citizen remains responsible for the abuse of the constitutional privilege? May a

prisoner convicted in a state Court of a capital offense be prevented by the state from honoring a contract for the services of competent counsel when the conviction under which he is held in custody for execution is assailed as having been obtained and upheld on appeal in violation of the Fourteenth Amendment and when the Supreme Court of the United States has ordered a federal Court hearing of the charges? May the state, in such circumstances, deny to the litigant-prisoner a right effectively to present competent evidence in proof of the charges by employing its naked power to seize, at its whim and pleasure, his valuable literary property and deny him all right to the use and sale of products of his mind?

6. Was Petitioner denied a basic requirement of due process and hence is the resulting judgment of the District Court invalid because the habeas corpus trial was held before a judge who entertained a personal, fixed and continuing bias against Petitioner and in favor of the State of California?

Should District Judge Louis E. Goodman have disqualified himself on the filing of the affidavit under 28 U.S.C. § 144 by Petitioner?

---

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

**[Rule 23-1(d).]**

Constitution of the United States, XIV Amendment, Sections 1 and 5:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

"The Congress shall have power to enforce by appropriate legislation, the provisions of this article."

Constitution of California, Article VI, Section 4½:

"No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

California Penal Code, § 209, as in effect during Petitioner's trial:

"Every person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or robbery or to exact from relatives or friends of such person any money or valuable thing, or who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the State prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnaping suffers or

suffer bodily harm, or shall be punished by imprisonment in the State prison for life with possibility of parole in cases where such person or persons do not suffer bodily harm."

California Penal Code, § 209, now in effect as result of 1951 amendment (Stats. 1951, ch. 1749, p. 4167):

"Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward, or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who kidnaps or carries away any individual to commit robbery, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the state prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnaping suffers or suffer bodily harm or shall be punished by imprisonment in the state prison for life with possibility of parole in the cases where such person or persons do not suffer bodily harm.

"Any person serving a sentence of imprisonment for life without possibility of parole following a conviction under this section as it read prior to the effective date of this act shall be eligible for a release on parole as if he had been sentenced to imprisonment for life with possibility of parole."

California Penal Code, § 1239(b):

"When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or his counsel."

California Code of Civil Procedure, § 953(e):

"When it shall be impossible to have a phonographic report of the trial transcribed by a stenographic reporter as provided by law or by rule, because of the death or disability of a reporter who participated as a stenographic reporter at the trial, or because of the loss or destruction, in whole or in substantial part, of the notes of such reporter, the court or a judge thereof shall have power to set aside and vacate the judgment, order or decree from which an appeal has been taken or is to be taken and to order a new trial of the action or proceeding."

California Rules on Appeal, Rule 33(c):

"Where a judgment of death has been rendered and an appeal is taken automatically as provided by law, the entire record of the action shall be prepared. For the purpose of computing time for preparation of the record, the notice of appeal shall be deemed to have been filed at the time of rendition of the judgment."

California Rules on Appeal, Rule 35(b):

"Where a reporter's transcript is required, the clerk, immediately on the filing of the notice of appeal, shall notify the reporter. The reporter shall prepare an original and 3 clearly legible typewritten copies of the reporter's transcript, in the manner and form required by Rule 9, and shall append to the original and each copy a certificate that it is correct. He shall deliver the original and all the copies to the clerk immediately on their completion, and in no case more than 20 days after the filing of the notice of appeal, unless such time is extended as provided in subdivision (d) of this rule."

Title 28 United States Code, § 144:

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit as to any judge. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

Title 28, United States Code, § 2201:

"In a case of actual controversy within its jurisdiction, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

Title 28, United States Code, § 2202:

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

Title 28, United States Code, § 2243:

"A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ of habeas corpus or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

"The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

"The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

"When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

"Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

"The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

"The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

"The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

Title 28, United States Code, § 2244:

"No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry."

Title 28, United States Code, § 2250:

"If on any application for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending."

---

## STATEMENT OF THE CASE.

**[Rule 23-1(e).]**

### A. History of the Instant Litigation.

The petition for the writ was originally filed in the District Court as No. 34375-Civil on December 30, 1954, after this Court had denied certiorari to the Supreme Court of California "without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court." (*Chessman v. Teets*, No. 285, Oct. Term, 1954, 348 U.S. 864.)

On January 4, 1955, Judge Louis E. Goodman summarily denied the petition without hearing or requiring Respondent to answer. (R. 24, Vol. I; *In re Chessman,* 128 F.Supp. 600.)

Two days later, Judge Goodman refused to issue a certificate of probable cause. (R. 36, Vol. I.) Petitioner then applied to Chief Judge William Denman of the Court of Appeals for the certificate, and on January 11, 1955 Judge Denman certified there was probable cause to appeal and ordered that Petitioner's execution, then scheduled for January 14, 1955 be stayed. (R. 39-43, Vol. I; *Application of Chessman,* 219 F.2d 162.) The notice of appeal (R. 37, Vol. I), dated January 5, 1955 was filed and the appeal docketed as No. 14621 in the Court of Appeals.

After the cause was briefed and argued on a shortened time, on April 7, 1955 the order denying the petition for habeas corpus was affirmed by the Court of Appeals sitting en banc. (R. 47-48, Vol. I; *Chessman v. Teets,* 221 F.2d 276.) Rehearing was denied on May 6, 1955 and on May 12 the order amending the order denying rehearing was filed, with Petitioner's stay of execution being thereby terminated.

On May 13, 1955 Petitioner was resentenced to death, with the date of execution in the warrant fixed for July 15, 1955.

On June 30, 1955 the case was docketed in this Court and a petition for writ of certiorari was filed, No. 196, Oct. Term, 1955. Justice Tom Clark granted Petitioner's application for a stay of execution pending a decision on the petition for writ of certiorari, the stay order being filed by this Court's Clerk on July 6, 1955.

On October 17, 1955 this Court granted certiorari, reversed the Court of Appeals, and remanded the case to the District Court for a hearing. (*Chessman v. Teets*, 350 U.S. 3.) In its Per Curiam opinion, this Court discussed Petitioner's claims and held as follows:

> "Petitioner applied to the United States District Court of California, Southern Division, for a writ of habeas corpus, claiming that his automatic appeal to the California Supreme Court from a conviction for a capital offense had been heard upon a fraudulently prepared transcript of the trial proceedings. The official court reporter had died before completing the transcription of his stenographic notes of the trial, and petitioner alleges that the prosecuting attorney and the substitute reporter selected by him had, by corrupt arrangement, prepared the fraudulent transcript. On the record before us, there is no denial of petitioner's allegations. The District Court, without issuing the writ or an order to show cause, dismissed the application as not stating a cause of action. 128 F.Supp. 600. The Court of Appeals affirmed the order of the District Court. 221 F.2d 276. The charges of fraud as such set forth a denial of due process of law in violation of the Fourteenth Amendment. See Mooney v. Holohan, 294 U.S. 103. Without intimating any opinion regarding the validity of the claim, we hold that in the circumstances disclosed by the record before us the application should not have been summarily dismissed. Accordingly, the petition for a writ of certiorari is granted, the judgment of the Court of Appeals is reversed and the case is remanded to the District Court for a hearing."

And in earlier certifying probable cause (*Application of Chessman*, 219 F.2d 162), Chief Judge Denman observed (R. 41, Vol. I):

"How important the California law regards this transcription [of the trial proceedings] and certification [as to its correctness] by the reporter is apparent from the fact that in *civil* cases the death of the reporter before his transcription and certification, gives the trial court the discretionary power to set aside the judgment and order a new trial. California Code of Civil Procedure, § 953(e). By some quirk in California legislation this does not apply to criminal cases. However, it is obvious that if the reporter's transcript is so important as to give the court such power in a civil case, *a fortiori* it must have such importance in a criminal case in which, on the evidence to be transcribed, the accused is sentenced to death. Likewise its importance is emphasized by the California law making the appeal automatic from death sentences. California Penal Code, § 1239(b)."

This Court's mandate came down and was filed in the District Court on November 28, 1955. (R. 53, Vol. I.) On November 30, 1955, Oliver J. Carter, the Judge then sitting in the Master Calendar Department, assigned the proceeding back to Judge Louis E. Goodman over the objection of counsel for Petitioner. (P.T.R. 2-6, Vol. II.)

Judge Goodman rejected counsel for Petitioner's suggestion he disqualify himself (P.T.R. 7-13, 19-20, Vol. II), ordered Petitioner's execution stayed (R. 54, Vol. I), and issued a writ of habeas corpus returnable December 8, 1955. (R. 55, Vol. I.)

Subsequently, on December 30, 1955, Judge Goodman ordered stricken (R. 120, Vol. I) an affidavit, accompanied by the required certificate of counsel, filed December 29, 1955, under 28 U.S.C. § 144, which sought

to disqualify him from hearing the matter. (R. 101, Vol. I.)

The uncontradicted facts set out in the affidavit show: that Judge Goodman's intemperate language in his earlier opinion, reversed by this Court, and rebuking this Court for suggesting the filing of the petition, as well as demanding rhetorically, "When does the wheel stop turning? What must the citizen think of our 'nickel in the slot' administration of criminal justice?" gave judicial sanction to public passion and prejudice. That the angry words of that opinion, further, were used to fan the fires of hatred against Petitioner and to create a climate of hysteria, as detailed in the affidavit. (R. 101-105, Vol. I.) That, during the course of the pre-trial proceedings, Judge Goodman repeatedly complained that the case was before him, said it belonged in the California Courts, and referred to his Court as a laundry. That he assured Petitioner he would change his custody and then refused to do so, even after Respondent's counsel joined in motioning for such transfer; and that, in the circumstances shown, "not only does Judge Goodman refuse to give [Petitioner] any opportunity to prepare and is willing to let him be subjected to intolerable conditions, but he further refuses to grant [Petitioner] reasonable time to prepare." (R. 105-118, Vol. I.)

Petitioner was produced in Court on December 8, 1955, and hearing of the matter was set for January 9, 1956, then put over one day to January 10, 1956, and later reset for January 16, 1956.

On December 8, 1955, Judge Goodman made an order that Respondent should permit Petitioner to consult freely

and privately with his counsel at the prison between the hours of 9 a.m. and 6 p.m. on all days pending the hearing. (R. 59, Vol. I.) This order was amended on December 21, 1955 to permit an investigator and witnesses also to consult freely and privately with Petitioner. (R. 100, Vol. I.)

But Judge Goodman refused to enforce these orders. (R. 110-117, Vol. I.) Pending the hearing, Petitioner repeatedly motioned to be transferred from San Quentin Prison to the San Francisco County Jail, in custody of the United States Marshal, on the grounds he was being prevented from preparing his case for hearing, that conference conditions were prohibitive at the prison, that Respondent was subjecting Petitioner and his counsel to every conceivable type of harassment, and that Judge Goodman's amended order was being openly and flagrantly violated by Respondent. (R. 60-79, 86-87, 89-98, Vol. I; see R. 109-117, Vol. I, and P.T.R. of November 30, and December 8, 16, 21 and 22, 1955.)

None of the facts presented in the affidavits or stated by counsel in Court was disputed or denied. Not a single counter-affidavit was filed.

All of these motions for transfer were denied by Judge Goodman (R. 48, 59, 99, Vol. I), even after counsel for Respondent joined in one of the motions. (P.T.R. 148, 176, Vol. III.) A fair sample of Judge Goodman's unusual reaction and attitude toward counsel's attempts to secure adequate opportunity to prepare under reasonable conditions is revealed by his comments: "So he cannot conduct his conferences in a plush room in the Mark Hopkins Hotel;" "A lawyer has got to go out in the

rain;" "you have got to wear your old clothes over there, Mr. Davis, and make the best of the little rough going, you see;" "this should be in the State of California, but until there is some change in the statutes, we have got to use this laundry to take care of this matter instead of the State of California;" "I don't like to make an order" enforcing Petitioner's rights, because it was a state case; and "we cannot control what the higher courts or what Congress determines are matters that can come into this court." (P.T.R. 89-90, 124-125, 129, 136, Vol. III; see R. 109 et seq., Vol. I.)

Yet when the matter was first brought up and his qualification to hear the case had been raised by counsel, Judge Goodman stated without qualification that Petitioner was entitled to an order transferring custody and that he would make it. (P.T.R. 14, Vol. II.)

On December 30, 1955, following the filing of the above-mentioned affidavit to disqualify him, Judge Goodman offered to transfer Petitioner to Alcatraz, terming the offer "unprecedented" and giving the impression that, if accepted, Petitioner then would be placed in a position to prepare. (P.T.R. 187-190, Vol. III.) Petitioner immediately accepted but, learning of the dangers of accepting blindly, asking only that he be transferred with such directions to the Warden of Alcatraz as would make the purpose of the transfer meaningful. (R. 123, 125, 128, Vol. I.) Petitioner's counsel, by a phone call to Warden Madigan, had been warned that if Petitioner were to be transferred without such orders Petitioner would be confined in what amounted to solitary confinement; he would find himself in an even worse situation than pres-

ently existed at San Quentin. (R.134-138, Vol. I.) Judge Goodman, not denying this, chose instead to chide Petitioner and his counsel for not accepting his "unprecedented" offer blindly and unconditionally, and refused to make the transfer. (R. 126; see R. 128, 130, 132, Vol. I.)

Having exhausted his funds and credit, some $10,000 having been spent in litigation of the case since Judge Goodman's earlier "wheel-turning," "nickel-in-the-slot" adverse decision, its reversal by this Court, and in preparation for the hearings, Petitioner was obliged to file an affidavit seeking to proceed in forma pauperis on January 7, 1956. (R. 139, Vol. I.) On January 10, 1956, Judge Goodman, while expressing doubt it would mean anything, granted Petitioner leave to proceed in forma pauperis. (R. 157, Vol. I.)

Petitioner's motion to make the People of the State of California a respondent in the proceedings (R. 127, Vol. I) was denied. (R. 215, item 9(a), Vol. I; P.T.R. 220-224, Vol. III.)

This motion was made in advance of the hearings, on January 7, 1956. The grounds of the motion as stated therein were:

> "1. The People of the State of California are in fact and in law the real party in interest.
>
> "2. It is the People of the State of California's officers, agents and judicial officers who are charged with fraud, and unless the People are made a respondent, answerable directly to the Court, petitioner, through a technicality, will be foreclosed from calling and questioning these officers, agents and judicial officers, as adverse parties, rather than as merely hostile witnesses, and thus petitioner will be kept

from impeaching [them] and not being bound by their testimony, as permitted by Rule 43(b) of the Federal Rules of Civil Procedure.

"3. Unless petitioner is released from this technicality and is permitted to call and question these adverse parties in fact as adverse parties he will be greatly handicapped, if not virtually precluded, in and from proving his charges."

The District Court, on hearing the motion, declined to make the People a respondent but withheld final decision. (P.T.R. 220-224, Vol. III.) The motion was renewed during the hearings and rejected. (R. 215, item 9(a).) The District Court adopted the position that it was free to decide, at its pleasure, how much or how little latitude would be allowed in the examination of the three adverse witnesses (the prosecutor, J. Miller Leavy; the substitute reporter, Stanley Fraser; and the trial Judge, the Hon. Charles W. Fricke), as well as free to exercise its own discretion, rather than being bound by Rule 43(b), F.R.C.P., in determining the binding effect of their testimony upon Petitioner. (See P.T.R. 191-193, Vol. III; H.R. 173-176, Vol. V.)

Although J. Miller Leavy, the trial prosecutor charged by Petitioner with connivance and fraud in the preparation of the disputed reporter's transcript, was to be a material witness at the hearing and had a vital personal interest in its outcome (his job, future and reputation were at stake), the District Court permitted him to appear as one of the counsel for Respondent over the strenuous objections of Petitioner's counsel. (H.R. 3-9, Vol. IV.)

By written motion, Petitioner, proceeding of necessity in forma pauperis, asked the District Court to order that the dead reporter's shorthand notes be photostated and furnished Petitioner without cost. (R. 145, Vol. I.) When the hearings began, Petitioner renewed the motion, it not having yet been finally acted upon, making it under 28 U.S.C. § 2250. (H.R. 15-17, Vol. IV.) The District Court declared that section did not permit it to make such an order. (H.R. 17-18, Vol. IV.) While it indicated there was another provision of which Petitioner might avail himself (H.R. 19, Vol. IV), Petitioner did not and does not know what it is, and the District Court never said. Thus Petitioner was not able to secure photostatic copies of the notes by the shorthand reporter, essential to effective preparation and presentation of his case, because of his untimely poverty.

Under the provisions of 28 U.S.C. §§ 2201 and 2202, Petitioner filed an application for declaration of rights (R. 168, Vol. I), with supporting affidavits and exhibits. (R. 170, 174, 198, 199.) The purpose of the application was to secure a favorable ruling on Petitioner's right to reclaim his valuable literary property—the manuscript of an unpublished novel titled *The Kid Was a Killer,* authored by Petitioner—which had been seized by Respondent and held against the will and over the protest of Petitioner, and the release of which would have enabled Petitioner, at the time compelled to proceed as a poor person, to produce his own expert witness, as well as other witnesses, and to bear the cost of litigation and pay for the photostating of the shorthand notes.

A second purpose of the application was to secure a judicial declaration that the agreement entered into between Petitioner and George T. Davis, one of his counsel, was a valid one which Respondent must permit Petitioner to honor. Therein Petitioner, an established author, agreed to do a biography of the life and career of Mr. Davis in return for the major portion of the latter's fee, but Respondent had arbitrarily refused to allow Petitioner to do this writing, although Petitioner had no other means of securing the services of Mr. Davis, counsel in whom he had full trust and faith.

Judge Goodman summarily denied the application from the bench (1) on the primary ground that he had no "jurisdiction" to declare Petitioner's rights in a habeas corpus proceeding, and (2) on the second ground that he could not interfere with the "security regulations" at the prison. (H.R. 915-916, Vol. X.)

The ordered hearings were held, with Petitioner present, on January 16, 17, 18, 19, 20, 23 and 24, 1956. (H.R. 1-919, Vols. IV-X.)

On January 25, 1956, Judge Goodman ordered the matter submitted (H.R. 920-923, Vol. XI), and on January 31, 1956, Judge Goodman vacated the stay of execution, discharged the writ and remanded Petitioner to custody of the Respondent for execution. (R. 204-215, Vol. I; *Chessman v. Teets,* 138 F.Supp. 761.)

Petitioner applied to the District Court for a certificate of probable cause to appeal on February 10, 1956. (R. 218, Vol. I.) On February 15, 1956, Judge Goodman refused to issue the certificate. (R. 251, Vol. I.)

Thereafter, on February 29, 1956, Chief Judge William Denman of the Court of Appeals certified probable cause (R. 252-254, Vol. I), and on that same date Petitioner filed his second notice of appeal. (R. 255, Vol. I.)

Pursuant to the provisions of 28 U.S.C. § 1915, on his application, Petitioner was granted leave to prosecute the appeal in forma pauperis and on a typewritten record. (R. 261, Vol. I.)

On October 18, 1956, the Court of Appeals affirmed the order of the District Court (R. 287, Vol. I). The majority opinion (R. 264-281, Vol. I; *Chessman v. Teets*, ..... F.2d .....) was written by Judge Frederick G. Hamley and concurred in by Judge Dal Lemmon.

Chief Judge William Denman dissented. In his dissenting opinion (R. 18-22, Vol. I; .....F.2d ....., at .....), Judge Denman maintained that the majority opinion "proceed[ed] on a piecemeal application of the Fourteenth Amendment," and that, under the fact situation disclosed by the record, the state trial Court's order "creating the record must be set aside and the California Supreme Court's affirmation based on that record also must be set aside and the trial for the determination of the record proceed anew in the Los Angeles Superior Court with Chessman participating therein."

A timely filed petition for rehearing was denied November 20, 1956. (R. 287, Vol. I.) Again Chief Judge Denman dissented. He stated (R. 289, Vol. I):

> "This is clearly a case where the court first finds that the due process clause of the Fourteenth Amendment applies for all appeals created by state law

and then in this appeal, a matter of life or death to the appellant, says that it is inapplicable to a trial to determine the text of the record upon which the death sentence is to be determined as valid or invalid."

One week following the denial of rehearing, Judge Lemmon, speaking for himself, filed an extraordinary memorandum opinion (R. 292-295, Vol. I), in which he attacked Chief Judge William Denman, argued angrily—"If the English language means anything at all"—according to his legal and semantic view of the matter, that his Court was jurisdictionally barred from considering the question whether Petitioner had a constitutional right to be present at the settlement proceedings, but had considered the question nevertheless, and that "The matter should end there."

Judge Lemmon also maintained that Petitioner should be denied relief because "Nowhere does Chessman claim that he is innocent"—which is an extreme untruth, as will be shown. Judge Lemmon emphatically asserted further that the case should be decided by rigorous application of what he personally is convinced the habeas corpus law should be, not what it actually is. He stated, "The 'law's delay' in this case has become a national scandal," and concluded:

> "There remains only one more step to be taken in the case of the State of California versus Caryl Chessman. That step will be to carry out one of the two sentences of death entered against Chessman eight and a half years ago.

"Chessman has been accorded all due process except the long overdue process of his execution. By such execution, perhaps, the blot upon California's juristic escutcheon will be, if not wholly erased, at least partly dimmed."

(The following day, November 28, 1956, Chief Judge Denman filed his own memorandum opinion answering Judge Lemmon and reaffirming his own position, R. 295-297.)

The unfortunate consequences attending Judge Lemmon's intemperate opinion were what might be expected. For example, the black headline in the San Francisco *Call-Bulletin* for November 28, 1956, read: U. S. JUDGES ROW OVER CHESSMAN, and the lead paragraph of the story stated: "Judge Dal M. Lemmon, of the U. S. Court of Appeals, here today scathingly attacked his court's Chief Judge William Denman for the latter's stand that Caryl Chessman had been denied due process of law."

The story was sensationally reported in Bay Area and California newspapers. It was disseminated nationally by the major wire services. One representative editorial, published in the San Francisco *Examiner* on December 1, 1956, asserted:

"We agree with Judge Lemmon of the United States Court of Appeals that the law's delays in the Caryl Chessman case are a national scandal. . . .

"After this Chessman will come other Chessmans. So long as such creatures are permitted to subvert justice at will by misusing the right of writ of habeas corpus, that long will the blot remain.

> "Judge Lemmon and all other judges and members of the bar can best erase the blot by bringing about reforms [sic!] in the use of the writ. Only thus can be ended what Judge Goodman so precisely described, in this same Chessman case, as 'nickel-in-the-slot' administration of justice."

As a result of Judge Lemmon's opinion, Petitioner's execution was demanded forthwith and feeling against him was whipped to hysterical pitch.[1]

In such an atmosphere, Petitioner now brings his case to this Court for an impartial and judicial review.

**B. Proceedings in the State Courts Relative to the Preparation, Settlement and Acceptance of the Reporter's Transcript.**

Petitioner had been tried in the Los Angeles County Superior Court before a jury for the alleged commission of 18 felony charges. (The original trial record is before this Court as part of Petitioner's Exhibit 1, records of the California Supreme Court in Crim. 5006, *People v. Chessman.*)

The trial was a lengthy one, beginning April 29 and ending May 21, 1948. Petitioner defended himself. Eighty-one witnesses testified and were called or recalled a total of more than 120 times. (See Rep. Tr., Vol. 1, General Index to Witnesses, pp. i-v.) It will be noted the testimonial evidence alone comprises 1500 pages of the disputed Reporter's Transcript. (Rep. Tr. pp. 55-1558.) Eighty-four exhibits were offered. (See Rep. Tr., Vol. 1,

---

[1]Fortunately, the members of this Court are not required to blind themselves as judges to what is common knowledge and what they know as men. (*Watts v. Indiana*, 338 U.S. 49, 52.)

Index to Exhibits, pp. vi-x.) There were two full days of argument to the jury. (Rep. Tr. pp. 1559-1786.) More than 50 different complex instructions were given. (Cl. Tr. pp. 83-134.)

On May 21, 1948, Petitioner was found guilty of 17 of the charged felonies, acquitted on one. (Cl. Tr. pp. 172-222.) Motion for new trial was denied and judgment rendered on June 25, 1948, and Petitioner was then sentenced twice to death[2] and to 15 terms of imprisonment.[3]

The official court reporter died unexpectedly June 23, 1948 (Death Certificate of Ernest R. Perry; Pet. Ex. 18),[4] which was after the trial and before he had completed some 1200 pages of testimony, plus another 300 pages

---

[2]For two violations of section 209 of the California Penal Code, charging Kidnaping for the Purpose of Robbery, with a finding of bodily harm by the jury and a fixing of the punishment at death.

[3]For two violations of section 209 of the California Penal Code, charging Kidnaping for the Purpose of Robbery, with a finding by the jury of bodily harm and a fixing by the jury of the punishment at life imprisonment without possibility of parole as to one count and no finding as to bodily harm on the other count; for two violations of section 288a of the California Penal Code; for one count of Attempted Rape; for one count of Grand Theft, of an automobile; for 8 counts of First Degree Robbery; and for one count of Attempted Robbery.

[4]Before this Court, as part of the certiorari record, are the original exhibits of both Petitioner and Respondent which either were received in evidence or marked for identification in the District Court. Petitioner's Exhibits 1 to 18, 20 and 21 were received in evidence. (H.R. 152-157, 181, Vol. V; 296, 317, 348, Vol. VI; and 570, Vol. VII.) Petitioner's Exhibits 19 and 22 were marked for identification only. (H.R. 330, Vol. VI, and 582, Vol. VII.) Respondent's Exhibits A, B, D, E, F, G-1 through G-6 and H were received in evidence. (H.R. 109, Vol. IV; 277, Vol. V; 387, 396, Vol. VI; 487, Vol. VII; and 905-906, Vol. X.) Respondent's Exhibits C and I were marked for identification only. (H.R. 298, Vol. VI; 831, Vol. X.)

of the voir dire examination of prospective jurors and the prosecutor's opening address.

Immediately following the pronouncement of judgment, Petitioner moved the trial Court, the Honorable Charles W. Fricke, to set aside and vacate the judgment on the ground it was impossible to prepare a record for use on the automatic appeal. The motion was denied. Judge Fricke stated: "The Court will take judicial notice that Ernest R. Perry, who reported the trial, is dead." He then directed preparation of the record "to the limit of human beings in their use of human ingenuity." (Pet. Ex. 1, Jacket 3; Rep. Supp. Tr. on appeal, proceedings of June 25, 1948, pp. 14-16.)

Preparation of the record by this unique means, under the direction of J. Miller Leavy, Petitioner's prosecutor, was undertaken and Leavy finally selected his uncle-in-law, Stanley Fraser, to attempt a transcription of the dead reporter's shorthand notes. A contract between Fraser and the Los Angeles County Board of Supervisors was entered into, cancelled, and then renegotiated, on the positive but unverified representations of Leavy that not only Fraser, but other reporters as well, could read the notes. (Pet. Exs. 2, 3 and 4, Secretary of Superior Court file, Board of Supervisors file, and copies of minutes of Board of Supervisors authorizing two Fraser contracts, respectively.)

Petitioner sought a writ of prohibition against preparation of this transcript on the ground the notes could not be transcribed with any reasonable degree of accuracy and, in opposition, both Leavy and Fraser swore Petitioner was wrong and that what amounted to a "ver-

batim" transcript of the trial proceedings was being prepared by Fraser. Leavy further swore that Petitioner would have the transcript delivered to him "in court" and would be allowed to make any objections he might have to it at that time. On the basis of these sworn statements, the California Supreme Court summarily denied the writ. (Pet Ex. 1; *Chessman v. Superior Court*, Crim. 4950: petition and opposing memorandum and Leavy and Fraser affidavits in support of opposition.)

Preparation of the record thus was permitted to continue. After many months and extensions of time (see Pet. Ex. 1; file of extension Nos. 2692, etc.), on February 24, 1949, Leavy offered the partial Fraser reporter's transcript for filing in the trial Court. He then said: "In order for Mr. Fraser to complete this record *it has been necessary to submit to me the rough draft form in order that I may read it before he has copied it into final form.*" (Pet. Ex. 1, Jacket 3; Rep. Tr. of Proceedings re Filing of Rep. Tr. on April, p. 3.)

On April 11, 1949, on filing the remainder of the transcript, Leavy represented to Judge Fricke: "I have read this entire record, not only every page but *I feel I have read every word and the only correction I find is the one I am offering at this time . . . I feel this record . . . what Mr. Fraser prepared from Mr. Perry's notes, is as accurate a record as Mr. Perry could have prepared . . .*" (Ibid. pp. 10-11.) At this same time, Leavy represented further: "*. . . he [Fraser] got so he could read Mr. Perry's notes better than his own . . .*" (Ibid. p. 11.)

Appellant's copy of the Fraser transcript was then mailed to Petitioner at San Quentin and was delivered to

him in his death cell. Petitioner[5] then prepared and mailed to the trial Court in Los Angeles his "Motion to Augment and Correct Record," with a long list of noted omissions and requested corrections and with a supporting affidavit. (Pet. Ex. 11.)

In the motion, Petitioner explicitly stated: "That, as provided by Rule 35(c), Rules on Appeal, Defendant-Appellant moves a hearing be ordered to determine the jurisdictional question hereinabove raised, to enable the Defendant-Appellant to determine actually the ability of Mr. Fraser to read Mr. Perry's notes, and to enable the Defendant-Appellant to offer a showing this is not, and challenge it as, a usable transcript, and to enable the Defendant-Appellant to point out to the Court the many inaccuracies and omissions in this transcript, to prove these inaccuracies and omissions, and for the Court to determine these matters and then if this reporter's transcript can be, in a manner satisfactory and legal, corrected and completed, promptly to do so that the Defendant-Appellant may take his automatic appeal forthwith to the Supreme Court of this State." (Pet. Ex. 11: motion, pp. 2-3.)

Petitioner's express application to be produced in the trial Court in Los Angeles when the Fraser transcript was settled was first denied *without prejudice* by the California Supreme Court (Pet. Ex. 1; application and order of denial in file of Crim. 5006) and simply ignored by the trial Court, Judge Fricke (Pet. Ex. 17: "Affidavit Responsive

---

[5]Petitioner, at the time of the settlement of the disputed transcript was appearing *in propria persona*, without representation by counsel. He has been held in San Quentin Prison's Death Row, awaiting execution, since July 3, 1948. For five years and ten months from that date he continued to represent himself (H.R. 564-565, Vol. VII.)

to Reporter's Transcript of Proceedings Re Filing of Reporter's Transcript on Appeal.")

The Fraser transcript was settled on June 1, 2 and 3, 1949 at proceedings conducted by Judge Fricke in the absence of Petitioner, with Leavy actively participating as counsel for the People. (Pet. Ex. 1, Jacket 3: Rep. Tr. of Proceedings re Settlement of Rep. Tr. on Appeal.)

At that time, Judge Fricke admitted: "This situation in which we find ourselves with reference to preparing a proper transcript on appeal is one of those wholly unanticipated situations which is not specifically covered by the rules of the Judicial Council relating to appeals . . ." (Ibid. pp. 16-17.)

Instead of offering Petitioner counsel and holding a *hearing* on Petitioner's motion, Judge Fricke elected rather to criticize the fact Petitioner was forced to represent himself, stating: "So we find the defendant has also handicapped himself by refusing to have the aid of counsel . . . where as a matter of fact the situation is one in which he should have had counsel . . ."

Petitioner's sworn claims, appearing in the affidavit in support of the motion for a hearing, that Fraser had misrepresented his ability to read the shorthand notes, that Leavy had been guilty of hoodwinking the California Supreme Court, etc., were met by being brushed aside with Judge Fricke's statement that: "I realize the defendant, being on the defense side of the case, has an impression that everybody is against him and nobody is willing to do anything for him and that everybody is hostile to him; but I think such a conclusion is the result of a biased mind

and is not warranted by anything appearing in the record." (Ibid. p. 18.)

Stanley Fraser then was called and testified self-servingly under questioning by Leavy. (Ibid. pp. 19-26.)

Leavy stood by while Judge Fricke allowed 80-odd specific corrections proposed by Petitioner in his written list and denied some 140 others. (In view of Leavy's earlier statements—that he had found only *one* correction and that the Fraser transcript was "as accurate a record as Mr. Perry could have prepared"—the volume of allowed corrections and their character is of extreme significance as evidence of the admitted inaccuracy of the record.)

The Fraser transcript then was "approved" by Judge Fricke and filed with the California Supreme Court (ibid. p. 82). Petitioner immediately challenged its validity and adequacy in this latter Court by the institution of mesne proceedings.

Then, on August 18, 1949, Leavy presented himself to Judge Fricke, asked the record to show "we are proceeding in open Court on a regular Court day, and may the record show I have subpoenaed as witnesses here today" Ed Bliss and Al Matthews. Leavy asked the record to show further that Petitioner had an appeal pending in the State Supreme Court from the settlement and certification of the Fraser transcript and a motion "to compel this [Superior] Court to permit him to be present in Court when there is a further settlement of the record, and to attempt to compel the Supreme Court in some way to claim this record is not usable . . . In order to meet the appeal and motion," he asked to call the two witnesses.

(Pet. Ex. 1, Jacket 3: Supplemental Reporter's Transcript on Appeal as of August 18, 1949, pp. 2-3.)

In the face of this candid admission by Leavy that he wished to use the trial Court and its processes to foreclose a hearing on Petitioner's claims and to keep Petitioner out of Court, Judge Fricke stated:

> "I will allow the taking of testimony with the idea of assisting the Supreme Court in the determination of the motion . . . and to shed further light on matters which are not covered."
>
> (Ibid. pp. 3-4.)

The two witnesses, adverse to Petitioner, then proceeded to give their testimony in the absence of Petitioner.

Still over Petitioner's vigorous objections, with portions being ordered added to it but with hearings on its validity and adequacy never being held, this Fraser transcript was ultimately accepted by the California Supreme Court[6]

---

[6]That court admitted the challenged transcript was "prepared in a situation for which the Rules on Appeal do not expressly provide" (p. 458 of 35 Cal.2d); that "Concededly the reporter's transcript is not a verbatim record of every word that was said in the trial court" (p. 461 of 35 Cal.2d); that it was not certified as correct as required but only certified to be correct to the best of the substitute reporter's ability (pp. 458-459 of 35 Cal. 2d). While recognizing that, under State law, Petitioner was entitled to the *entire* record (p. 459 of 35 Cal.2d), the court refused to order the record augmented to include what is indicated in the transcript as a "(Discussion as to subpoenaing witnesses)" (Pet. Ex. 1: Rep. Tr. p. 10), and a "discussion between the trial court, counsel and the defendant (Chessman), and conceded by the deputy district attorney, that an attorney, William Roy Ives, given the opportunity to prepare the case, would appear with or for the defendant," (p. 465 of 35 Cal. 2d), both discussions taking place after the cause was called.

Finally, while recognizing that a determination of whether one reporter can transcribe another reporter's shorthand notes "is essentially a question of fact to be determined in each case in which it may arise" (p. 461 of 35 Cal.2d), and while placing the burden

(*People v. Chessman*, 35 Cal.2d 455 [218 P.2d 769, 19 A.L.R.2d 1084]), and subsequently used on the mandatory appeal as a basis for affirming the death and other judgments imposed (*People v. Chessman*, 38 Cal.2d 166 [238 P.2d 1001]).

**C. The District Court Hearing: The Manner in Which It Was Conducted by Judge Goodman; What Was Proved and What Was Not Permitted to Be Proved.**

On testifying in the District Court, Judge Fricke, Leavy and Fraser denied generally any fraud, connivance or collusion in the preparation of the Fraser transcript. (However, as will be shown, Petitioner established every fact alleged in the peti n (R. 7-23, Vol. I) which he was permitted to establish. As further will be shown, he sought and was prevented by Judge Goodman from proving the remainder of the facts alleged.)

Judge Goodman's biased attitude toward Petitioner and his counsel, Mr. Davis and Miss Asher, from the beginning to the end of the hearings is manifest in the record. He told Mr. Davis, practically at the outset, he was "taking too much time" and snapped "That's a silly question". (H.R. 78-79, Vol. IV.) A reference to the cited pages of the record shows that Mr. Davis was proceeding

---

of proving the prejudicial inadequacy of the transcript upon Petitioner (p. 462 of 35 Cal.2d), and noticing that Petitioner "urged that he should have been allowed to appear personally in the proceedings which resulted in the present reporter's transcript, and that he should now be allowed to appear personally before the trial judge in support of his position" (p. 467 of 35 Cal.2d), by denying his motions that he be allowed to appear in the Superior Court, adduce evidence and call hostile and unwilling witnesses, the Court itself foreclosed Petitioner from proving the record inadequate, and this was candidly admitted to be done as a discriminatory penalty for self-representation (p. 467 of 35 Cal.2d). See the dissenting opinions of Mr. Justice Carter and Mr. Justice Edmonds (pp. 468-473 of 35 Cal.2d).

as rapidly as possible and that the question, dealing with the extensive pencilled additions made by Fraser in the Perry notebooks (Pet. Ex. 16-A to K) was not "silly" but highly relevant.

While Leavy and Fraser were accused of conspiring to produce a fraudulent transcript, Judge Goodman would not permit Mr. Davis to question Fraser as to whether he and Leavy had discussed their anticipated testimony. "A jury might sometimes be impressed with that; I am not," Judge Goodman said. (H.R. 223-225, Vol. V.)

Although Fraser's status as a Court reporter and qualifications were directly in issue, Judge Goodman declared, while Fraser was being examined by Mr. Davis, "I am not interested in habeas corpus in a history of the witness" and "We are not concerned on habeas corpus with the qualifications or background of any of these people." (H.R. 176 and 177, Vol. V.)

The petition alleged the shorthand notes of the deceased reporter were "undecipherable to a large degree" and that Fraser was "incompetent to transcribe" those notes. (H.R. 9-10, Vol. I.) Yet, almost at the outset of the questioning of Fraser by Mr. Davis, Judge Goodman announced flatly that he was not going to allow the accuracy of the Fraser transcript or the ability of Fraser to transcribe the notes to be tested. (H.R. 248, Vol. V.) He stated further:

> The Court. Of course I don't know what he [Fraser] put down in the transcription.
>
> Mr. Davis. That's why I am trying to find out.
>
> The Court. I don't think the Supreme Court of the United States intended me to spend in this court

days or weeks of time in determining the accuracy of this transcript. *Whether they did or not, I am not going to do it.*

Mr. Davis. Well, could we have perhaps ten minutes on that?

The Court. That is not an issue in this case. This man [Fraser] could have been the most incompetent reporter in the world and he could have made a mess of the transcript in typing it, and that does not raise any federal question. The State of California and the parties to that litigation could determine that. (H.R. 249, Vol. V.)

And then:

The Court: That is right, I am not going to test his [Fraser's] ability in this proceeding or whether or not his statement that he transcribed this—made this transcript correctly is correct or not. . . .

If there is any failure of due process, as the Supreme Court has said, involved in this, that is another question. But the mere accuracy of it—it could be—*it could be 75 percent wrong, and it wouldn't raise any federal question.* (H.R. 250, Vol. V.).

Judge Goodman added: ". . . but what the State of California affords by way of methods of providing a transcript is not the subject or concern of this Court." (H.R. 250, Vol. V.)

Mr. Davis then made a detailed offer of proof. Judge Goodman gratuitously called it "an argument about what your views are on the matter," and added glibly, "I may be spending my time here listening to disputes between you and some other reporters about whether a certain symbol was blue instead of green . . ." (H.R. 252, Vol. V.)

For attempting to get Fraser to read unaided, if he could (which he finally admitted he could not), just one specified page of the shorthand notes from the stand, and taking the position Fraser might confer with those charged with him with fraud if he attempted a transcription overnight, Judge Goodman charged Mr. Davis with acting in bad faith. "It just leaves me utterly cold," Judge Goodman said. For stating Petitioner's position, Mr. Davis was accused by Judge Goodman of making "speeches," "and they just don't make any impression on me." Judge Goodman said Fraser couldn't be expected to transcribe that one page in the courtroom. "We can't do it. It's silly." Judge Goodman then tried to force Mr. Davis to say he didn't trust the Court merely for not agreeing to have Fraser attempt a transcription out of Court and under conditions where Fraser could refer to his own transcription and consult with Leavy. Judge Goodman finally said Fraser could do the transcription of that one already identified page of the notes the next day in chambers and Mr. Davis was forced to drop the matter. Such a test would have been meaningless. Overnight Fraser would have had every opportunity to check with his transcription and study the photostatic copy of the notes in Leavy's possession. (H.R. 282-293, Vol. V.)

Paul Burdick, a retired Court reporter, and the "warm friend" of Judge Fricke, Fraser and Leavy (H.R. 707-711, Vol. VIII), had been hired by the state, through Leavy, and exceptionally well paid (H.R. 732-737, Vol. IX) to check the Fraser transcript against the Perry notes.

Mr. Burdick testified for respondent that Fraser's was a very accurate transcription and that the Perry notes

showed the disputed jury instructions to be exactly like the transcript. (H.R. 699, 704, Vol. VIII.) Counsel for respondent had stated, "Furthermore, the man [Burdick] is an expert. He is certainly entitled to give his opinion as to the accuracy of *this* transcription," and the Court agreed. (H.R. 697, Vol. VIII.)

Yet, on cross-examination, Burdick asserted he hadn't said he was an expert on Perry's shorthand and Judge Goodman interrupted to state, "He didn't say that," although he had, and, over counsel for Petitioner's objection, had been allowed to answer questions on the basis of that qualification. (H.R. 724, Vol. VIII.) Burdick then admitted he could not read a whole page or a half of a specified page of the Perry notes! He could only make out an occasional word or two. (H.R. 725, Vol. VIII.)

Then came a succession of further startling admissions from Mr. Burdick: he had found places where argument was left out; where Perry had "skeletonized" his notes; where for six to eight pages the going was "fast and rough"; where words were left out; where as many as seven or eight lines of Perry's shorthand symbols had not been transcribed on argument on the admissibility of testimony. (H.R. 748-753, Vol. IX). Perry's notes were "difficult to read"; at places they were "shattered" and "shattered clear out of recognition." (H.R. 775-777, 785, Vol. IX.) The notes on the disputed instructions to the jury were "pretty well cluttered up with those pencilled notations" of Fraser, and those notes, too, were "*shattered.*" Burdick couldn't read them. (H.R. 789, 792 et seq., Vol. IX.) Judge Goodman then took occasion to state hastily that he was not concerned with the ability of the

witness to decipher the notes before him. (H.R. 795, Vol. IX.)

With Judge Goodman's summary denial of Petitioner's application for declaratory relief (H.R. 916, Vol. X; R. 168, Vol. I), Petitioner was foreclosed from producing his own expert. (R. 198, 200-201.) This expert, Petitioner had been informed, was prepared to testify the Perry notes could not be transcribed with any reasonable degree of accuracy and that the Fraser transcript could not have been prepared in material part from those notes. (R. 199-200, Vol. I.)

The Harry Person letter of September 16, 1948, set out in the petition (R. 9-10, Vol. I) *was* written. (Pet. Ex. 3, true copy in this file; H.R. 69, Vol. IV.) Judge Fricke *had* heard, he testified, that the notes could not be transcribed with sufficient accuracy and that other reporters had examined the notes and could not read them but Leavy had represented to him that Fraser could. (H.R. 862-863, 875, 860, Vol. X.)

Judge Fricke testified he *had* told Leavy to get the Perry notes and see that they were placed in the custody of the Secretary to the Superior Court (H.R. 846, Vol. X), and Leavy had told Judge Fricke this had been done. (H.R. 847, Vol. X.) But it was *never* done. The Perry notes were kept either by Leavy or Fraser from 1948 and, when Fraser had completed the transcription, he still retained them. As late as 1954, they were stored by Fraser's brother in a garage (H.R. 390, Vol. VI, 503, Vol. VII), and Judge Fricke never knew this. (H.R. 849, Vol. X.) Then the notes were put in a safety deposit box by Cecil Luskin and Leavy (H.R. 81, Vol. IV, 503-504, Vol. VII),

with the alleged and intended result that Petitioner never was able to have them examined until they were produced in the District Court in December, 1955. They were kept suppressed by Leavy.

Fraser *was*, as alleged, paid over three times the statutory fee for his preparation of the Fraser transcript. (H.R. 208-209, Vol. V.)

The alleged relationship between Leavy and Fraser *did and does* exist. Fraser was and is the uncle-in-law of Leavy (H.R. 170, Vol. V, 452, Vol. VII), a fact kept concealed from Judge Fricke until after the transcript was settled. (H.R. 860-861, Vol. X.)

Fraser admitted he *did* let Leavy check the "rough draft" and *did* "get his [Leavy's] corroboration, his ideas, his recollection in places where I had difficulty . . ." (H.R. 399, Vol. VI.) Leavy admitted he *did* check the rough draft at both his home and office from time to time —on perhaps more than 25 separate occasions—and satisfy his mind Fraser "had it." (H.R. 531-532, 536, Vol. VII.)

Without the knowledge of Judge Fricke (H.R. 870-871, Vol. X) or Petitioner (H.R. 592, Vol. VIII), but *with* the knowledge and at the suggestion of Leavy (H.R. 504, 533, Vol. VII), Fraser had conferred with two key prosecution witnesses, Los Angeles Detectives Lee Jones and Colin Forbes, about Fraser's rough draft transcription of their trial testimony (H.R. 396-397, 417-420, Vol. VI), thus permitting their testimony to be reconstructed not only in the absence of Petitioner but out of Court and secretly. This fact was not known to the State Supreme Court in any of the proceedings before it and never disclosed by

Leavy or Fraser until the hearing in the District Court. Judge Fricke testified that if he had known Fraser had seen Jones and Forbes, the matter *would* have been raised at the time of the settlement. (H.R. 871, Vol. X).

Judge Fricke testified he had *not* told Leavy he was going to produce Petitioner at the settlement and *never* had given Leavy authority to file the affidavit with the California Supreme Court in which Leavy had sworn Petitioner would be produced in Court at the time of the settlement proceedings. (H.R. 883, 887, Vol. X.)

The petition alleged that Fraser was incompetent, had a long record of arrests for being drunk, and was addicted to the excessive use of alcohol. (R. 11-12, Vol. I.) And when questioned by counsel for Petitioner, Judge Fricke testified: "I wouldn't have hesitated for a moment in revoking any proceedings that had been had up to that time if I had found out about it afterwards," referring to Fraser's alleged incompetency as a result of his chronic addiction to alcoholic beverages, and: "If I had even heard the rumor, I would certainly have gone and made an investigation to ascertain whether there was any foundation for it or justification for it." (H.R. 890, Vol. X.)

Yet both before and during the hearings Petitioner repeatedly sought to produce the arrest reports of the FBI and CII, as well as the files and arrest reports of the Los Angeles Police Department, to prove these allegations, and the District Court refused to require or permit their production and ruled them "inadmissible". (H.R. 911-912, Vol. X; R. 147, item 5, 152, item 20; see R. 162, item 4, Vol. I.) Petitioner was also foreclosed from proving by hospital records that Fraser's excessive

and chronic addiction to alcohol led to delirium tremens, hallucinations, attempted suicide and lengthy hospitalization. (See R. 153, item 21, 162, item 5, 147, item 6, 150, Vol. I.)

Every attempt by Petitioner in advance of and during the hearings to secure subpoenas for the production of, or to take the depositions of, his witnesses was denied by the Court. (R. 157, Vol. I; H.R. 552, 913-914, Vol. X; see P.T.R. 243-249, Vol. III.) The witnesses whose testimony Petitioner sought to get before the Court and the nature of the testimony will be found at R. 151-153, 160-166, 167, Vol. I; see P.T.R. 227 et seq., 243-249, Vol. III.

Mr. Davis was trying to get Fraser to identify with particularity some of the contents of the Perry notebooks and Judge Goodman told him to go to something else. (H.R. 309, Vol. VI.) Judge Goodman then used his power to shut off inquiry by putting the notes in, taking them out, and then putting them back in evidence. (H.R. 314-317, Vol. VI.) When the matter arose, Judge Goodman was immediately willing to supply speculation why two pages of the Perry notes might be missing. (H.R. 367, Vol. VI.) Mr. Davis sought to impeach Fraser on his sworn claim that the Perry notes became easier to read as he went along and Judge Goodman said: "I think the Court will be the judge of the witness," thus foreclosing impeachment. (H.R. 429, Vol. VI.) At this same point, Judge Goodman stated: "There is no such statement as that in the affidavit." But there plainly is, as reference to the affidavit shows. Judge Goodman announced "offhand" that Petitioner would be bound by every word Judge Fricke said if Petitioner called him and that Mr. Davis

wouldn't have any particular right to cross-examine, then: ". . . you can take it or leave it, the way you want." (H.R. 435, Vol. VI.)

Miss Asher was questioning Petitioner concerning his attempt and asserted right to be present at the settlement proceedings when Judge Goodman shut off the inquiry with this comment: "It doesn't make any difference whether a man wants to exercise his rights or he doesn't want to exercise them. If he has—he either has the right or he hasn't. That's all there is to it. I don't see that there is any use in wasting time on this phase of the matter." (H.R. 583-584, Vol. VII.)

Miss Asher then sought from Petitioner his testimony concerning the errors in the transcript which he contended prevented him showing he had been convicted unconstitutionally. Judge Goodman again interrupted to make the extraordinary announcement that if there were not many errors in the transcript involving constitutional issues he would allow the questions to be answered "but if there are going to be a great many of them, then I would have to say that that would be beyond the field of requirements in this habeas corpus proceeding." (H.R. 643, Vol. VIII.) The only thing, he added, "that would rise to the dignity in and of itself of having any real meaning or bearing on the question of fraud would be the question of the instructions of the judge." (H.R. 643-644, Vol. VIII.)

Judge Goodman then impatiently asked Miss Asher how much time she would need and when she replied he commented, "A lawyer's statement in that regard is not too dependable." (H.R. 644, Vol. VIII.) He told her to rush. (H.R. 645.)

As to Petitioner's continued desire, expressed by Mr. Davis, to call Judge Fricke, Judge Goodman said: "I know. I have heard that story for a long time." (H.R. 683, Vol. VIII.)

Judge Goodman sustained Respondent's objection to counsel for Petitioner questioning Judge Fricke regarding a discussion at the trial regarding the subpoenaing of witnesses on the ground it appeared in the transcript. (H.R. 839, Vol. X.) It positively does not appear. (Pet. Ex. 1: Rep. Tr. on Appeal in Crim. 5006, p. 10, Vol. 1.)

So it went. Finally, after hearing days of testimony on how Judge Fricke had ordered the preparation of the transcript by "human ingenuity," under the unsupervised direction of the prosecutor by his uncle-in-law, and without allowing any participation by Petitioner, Judge Goodman made his most remarkable comment: "Counsel, it isn't necessary for a judge to proceed with an appeal. He hasn't got anything to do with it. The litigant does that." (H.R. 855, Vol. X.)

Thus ended the hearings a bare majority of the Court of Appeals characterized as "full and fair."

---

## REASONS FOR GRANTING THE WRIT.

**[Rule 23-1(h).]**

"History indicates," wrote Mr. Justice Black dissenting in *Beauharnais v. Illinois*, 343 U.S. 250, 274, "that urges to do good have led to the burning of books and even to the burning of 'witches.'"

Here these same urges have led to the publicly threatened burning of one of Petitioner's books, *Trial by Ordeal,* by a Chief Assistant to the California Attorney General; to the arbitrary seizure and holding of other of Petitioner's manuscripts, including one worth thousands of dollars, by a prison warden; to forcing pauper status upon Petitioner knowingly and deliberately, involving the enforcement of stringent orders that Petitioner must not be allowed to write a line for publication, by the director of a prison system regarded, ironically, as the most enlightened in the Nation; to a strident clamor for swift "gas chamber justice" for "this known fiend," "unconscionable monster," "legal Houdini" and "criminal genius" (Petitioner), around whose name a dark, frightening legend has been headline-woven by the press; and to widespread, ill-considered demands and editorial crusades for "reforms" which would result only as a practical matter, in leaving a wrongly and unconstitutionally convicted person remediless, and at the mercy of mob feeling and what Mr. Justice Frankfurter has aptly termed "the humorless absolutism of the moment," by emasculating the writ of habeas corpus, "this greatest of all safeguards against official oppression."

Here a quasi-legal and uncritical "moral" imperative (Petitioner *must* be executed) has been substituted for the adjudicatory process and a purely legal judgment (*is* Petitioner held in custody in violation of the United States Constitution?). Here, not only has a feeling of passion and prejudice pervaded the courtroom, but the hearing judge and the appellate judge, whose concurrence with one other swung the balance against Petitioner, have

frankly made appeals to this feeling to obtain what they, subjectively and philosophically, believe to be desirable ends: Petitioner's death and changes in the law.

In consequence, a reasoned, unwrathful and *judicial* resolution of the case, and the issues tendered by it, is of the utmost public importance, as well as being a matter of life or death to Petitioner. Certiorari, then, should be granted for the following specific reasons:

1. California law *mandatorily* requires an automatic appeal to its Supreme Court in capital cases (Calif. Pen. Code, § 1239(b)). This appeal is an "extraordinary precaution" taken by the Legislature "to safeguard the rights of those upon whom the death penalty is imposed by the trial court." (*People v. Bob,* 29 Cal.2d 321, 328.) In California, "The right of appeal to the Supreme Court is guaranteed by the constitution to the prisoner and is as sacred as the right of trial by jury." (*In re Hoge,* 48 Cal. 3, 6; see *In re Albori,* 95 Cal.App. 42, 48-49.) And "when by judicial oppression such right [of appeal] is violated or vitiated, the guaranteed substantial rights of a party have been materially affected thereby." (*Wuest v. Wuest,* 53 Cal.App.2d 339, 345.)

The Rules of the California Judicial Council declare that, in a death penalty case, the *entire* record of the trial must be prepared and certified as true and correct by the court reporter who stenographically recorded the trial proceedings. (Rules on Appeal, Rules 33(c) and 35(b).) "The Rules on Appeal have the force of law and cannot be disregarded or ignored by litigant or court." (*Kuhn v. Ferry & Hensler,* 87 Cal.App.2d 812, 815.) "[T]he pro-

cedural rules of the courts are a part of the due process of law established in this state . . . and must be observed in the interest of orderly functioning of the administration of justice." (*People v. Gilbert*, 25 Cal.2d 422, 439.) And the state's organic law commands that the California Supreme Court must review the *entire* record in a death penalty case before affirming or reversing. (Const. of Calif., Art. VI, § 4½.)

Yet here, with the death of the court reporter, the record was not and could not be prepared in accordance with any existing law or rule governing appeals and particularly this mandatory appeal. All state-established due process had to be thrown out and an *ad hoc* procedure had to be invented if a record was to be prepared at all. One was, by "human ingenuity," over Petitioner's vigorous objections. Petitioner was never allowed to defend against this transcript or to be present when it was created, settled and "approved." His motions for a hearing at which he might challenge its validity and adequacy were ignored or denied. Nevertheless, as shown, it was used as a basis for affirming the judgments of conviction imposing two sentences of death and 15 sentences to prison.

Petitioner alleged in his petition to the District Court, *inter alia*, that this procedure deprived him "of his constitutional rights and due process of law and equal protection of the law." (R. 8, 14; Vol. I.) Judge Lemmon, speaking for himself, in his unusual memorandum opinion, maintained this Court's opinion in 350 U.S. 3 marked the extreme limits of his Court's jurisdiction and hence that his Court jurisdictionally could not entertain and decide the question. This, of course, is completely incorrect. Chief

Judge Denman's answering memorandum opinion of October 28, 1956 provides a decisive reply to the contention.

Petitioner desires to add just this: This Court has squarely held that decisions in habeas corpus on prisoners in custody under state process are *not* res judicata. (*Brown v. Allen*, 344 U.S. 443, 457; see *Price v. Johnson*, 334 U.S. 266, 291.) Where the ends of justice will be served by a successive inquiry, 28 U.S.C. § 2244 specifically authorizes the judge or Court to make such an inquiry, and this Court expressly has so held (*Brown v. Allen*, supra, at 508).

Thus earlier decisions of the Court of Appeals in 205 F.2d 128 and 221 F.2d 276, dealing only with fragmented aspects of the question, were and are no *jurisdictional* bar to consideration of the question. Neither are the federal Courts bound by decisions or findings of the state Courts. This Court has, and the Court of Appeals had, the constitutional power to inquire whether the state law and state process, as construed and applied, has afforded Petitioner due process and equal protection of the law (*Hebert v. Louisiana*, 272 U.S. 312, 316; *Buchalter v. New York*, 319 U.S. 427, 429); and such an inquiry and decision cannot be foreclosed by the prior finding of the state Court; the federal Court will independently examine the facts and reach its own conclusion (*Norris v. Alabama*, 294 U.S. 587, 590; *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 659; *Niemotko v. Maryland*, 340 U.S. 268, 271). As decisively held by this Court in *Reece v. Georgia*, 350 U.S. 85:

> "We have jurisdiction to consider all the substantial federal questions determined in the earlier

stages of the litigation (citation), and our right to re-examine such questions is not affected by a ruling that the first decision of the state court became the law of the case. (Citation.)"

The Court should put the question at rest. Significantly, this is the very first opportunity the Court has had to do so for the reason that this is the very first time, after eight and one-half years of litigation, that Petitioner has succeeded in getting all the state Court records and other evidence on which the question is based before the federal Courts.

The affirmative reasons Petitioner is entitled to relief are succinctly set out in Chief Judge Denman's October 18, 1956 dissenting opinion, his November 20, 1956 dissent from denial of rehearing, and his subsequently filed memorandum opinion answering Judge Lemmon.

It should be noted (1) that Judge Goodman in the District Court did not and would not even consider the question, and (2) that actually the three judge panel of the Court of Appeals did not decide the question. Judge Lemmon, although first concurring in the bare majority opinion of Judge Hamley, then, in that later memorandum opinion of his own, emphatically denied the Appellate Court had any jurisdiction to consider the question (a matter disposed of above), and made it clear his sole concern was with getting the habeas corpus law changed to accord with his personal views of what that law should be and in the process with getting Petitioner promptly put to death.

Judge Hamley's "majority" opinion (no longer that at all with the position subsequently taken by Judge Lem-

mon) assumes, "without deciding," the question might be considered. But the opinion then avoids deciding the equal protection phase of the question with the erroneous statement: "There is here no contention that appellant was denied a right which is customarily accorded to other convicted persons. Had such a showing been made, a serious constitutional question would be presented," citing *Griffin v. Illinois*, 351 U.S. 12, 18.

But Petitioner clearly has been denied a right which is not only "customarily" but *mandatorily* accorded to other convicted condemned persons in California. In all other cases in the state heard under the automatic appeal law and governing rules there has been, *without exception*, a full appellate review upon a complete, jurisdictionally prepared and unchallenged record. In this one case—and this one only—there has been a lesser review, upon an admittedly incomplete, in effect uncertified, and challenged record, prepared by "human ingenuity," with Petitioner being given no opportunity to defend against the use of the record or having any voice in its preparation and settlement. Equal protection? Here there is neither equality nor protection. Justice (if it can be so called) cannot, under our Federal Constitution, be administered with so unequal a hand. (*Yick Wo v. Hopkins*, 118 U.S. 356; see *Dowd v. Cook*, 340 U.S. 206, 210; *Cochran v. Kansas*, 316 U.S. 255.)

Fortunately, this Court may take judicial notice of its own records (*Dimmick v. Tompkins*, 194 U.S. 540, 548). By doing so, it will find that not only did Petitioner expressly allege a denial of equal protection in the instant

petition but that he repeatedly has pressed this claim in the earlier litigation. (See, e.g., No. 239 Misc., Oct. Term, 1953, p. 19 of the petition for certiorari ["California has persisted in denying to Petitioner that type of appeal accorded all others similarly situated"], and pp. 53-64 of that record, where the complaint is there spelled out.)

Judge Hamley's opinion concedes that the record was prepared under what is there mildly termed "unusual circumstances" but asserts this "called only for the exercise of a sound discretion in adopting procedures adequate to meet the special situation." The claim that such a "sound discretion" was employed or that the procedures were "adequate to meet the special situation" is thoroughly refuted by the record.

Moreover, this Court has held that "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion." (*Roller v. Holly*, 176 U.S. 398, 409.) "The law itself must save the parties' rights, and not leave them to the discretion of the courts as such." (*Louis. & Nash. R.R. v. Stock Yards Co.*, 212 U.S. 132, 144.) In determining their adjective as well as substantive law, state courts must accord the litigant due process of law. (*Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 682.) And the essential elements of due process of law are notice and *adequate opportunity* to defend (*Louisville, etc. R. Co. v. Schmidt*, 177 U.S. 230, 236; *Simon v. Craft*, 182 U.S. 427, 436.) But here Petitioner was given *no* opportunity to defend against the use of the disputed transcript, although the California

Supreme Court placed the burden of proving that transcript's invalidity and inadequacies squarely upon him. (See *Saunders v. Shaw*; 244 U.S. 317, 319.)

In practical effect, Judge Hamley's opinion holds that because the state did produce, settle and use a record of sorts on appeal, rather than no record at all, Petitioner can ask and due process and equal protection may demand no more.

This is necessarily to say, under the undisputed facts of this case, that it is all right to produce a record by "human ingenuity," in contravention of all established, controlling and settled state law; to delegate, not to some impartial party, but to the prosecutor, the unsupervised authority to select a substitute reporter to prepare such a record of the trial proceedings; to let the prosecutor select his own uncle-in-law, and keep this fact carefully concealed from the trial judge, the Petitioner and the reviewing Court; to let the prosecutor and the substitute reporter consult on the transcription out of Court; to grant the substitute reporter unlimited time to prepare the record; to let him talk to detectives—key trial witnesses for the prosecution—out of Court, using these talks as a basis for reconstructing their testimony, at the suggestion of the prosecutor, and keep this fact from the trial judge, the Petitioner, and the reviewing Court; to let the substitute reporter prepare the transcript in rough draft form, the rough draft never being seen by the trial Court or Petitioner, although Petitioner formally had asked to be furnished a copy, and then, also out of Court, to permit the prosecutor to "check" the draft before it was copied in final form; to let the prosecutor swear to the

reviewing Court that Petitioner (representing himself and held at a state prison) would be produced in Court when the record was settled and never let the trial judge know of this sworn statement;[7] to pay the reporter more than three times the statutory fee for his work; to hold hearings to create and settle the record with neither Petitioner nor counsel representing him present;[8] to have Petitioner's motions to be present and challenge the transcript and the ability of the substitute reporter to transcribe the dead reporter's notes denied by the reviewing Court without prejudice and ignored by the trial Court; to proceed to have witnesses testify and settle the transcript in the absence of Petitioner; to have the trial judge "approve" such a record without testing the competence of the substitute reporter to decipher the dead reporter's shorthand notes, although the trial judge knew the local Superior Court Reporters' Association officially had gone on record that other Court reporters had examined the notes and found them to be indecipherable in material part; to have the trial judge let the prosecutor use his Court and its processes to keep Petitioner out of Court and foreclose a state Supreme Court-ordered hearing on the validity and adequacy of the record; to have this dis-

[7]The statement bordered on, if it did not actually involve, perjury. See Calif. Pen. Code, § 125: "An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false." Certainly the statement amounted to a fraud upon the California Supreme Court.

[8]Where the accused is defending himself, this Court has held that the trial judge must be particularly alert to see that the accused is not overreached and taken advantage of. (*Gibbs v. Burke*, 337 U.S. 773, 781.) But here, by not producing Petitioner or offering him counsel when the record was settled, the trial judge himself was the person responsible for Petitioner being overreached and taken advantage of.

puted record accepted by the reviewing Court and used as a basis for affirming death and other judgments, although it was not certified to be complete and correct as required, but only correct to the best of the substitute reporter's ability; and to never allow Petitioner to defend against the use of that transcript or to establish, as he claimed, that missing from it, or garbled in the transcript of it, were sections in which it should have affirmatively appeared that Petitioner had been convicted in violation of fundamental constitutional rights.

This, to say the least, is a singular definition of due process and equal protection of the law. As stated by the late Mr. Justice Jackson in a separate opinion in *Brown v. Allen*, 344 U.S. 443, 446: "But I know of no way that we can have equal justice under law except we have some law." The use of "human ingenuity," by the prosecutor, whose avowed purpose was to see Petitioner executed, is certainly no substitute for law.

2. Petitioner was deprived of an impartial determination of his appeal to the Court of Appeals by Judge Dal M. Lemmon's participation therein.

The memorandum opinion filed by Judge Lemmon after the denial of rehearing (attacking Chief Judge William Denman under the guise of answering Judge Denman's dissent from the denial of rehearing, as well as impliedly rebuking this Court for ordering the hearings through the device of terming the continued litigation of the case a "national scandal," arguing for changes in the habeas corpus law, and assuming the role of partisan and advocate of the State of California by maintaining that

Petitioner *must* be executed to erase or at least partly dim the purported "blot upon the State of California's juristic escutcheon") reveals such an extreme absence of judicial fairness, impartiality, restraint and objectivity on Judge Lemmon's part that this Court's power of supervision is called for.

Further, Judge Lemmon's statement that "Nowhere does Chessman claim that he is innocent" is *not* true.

*Petitioner has consistently and vehemently maintained his innocence.* Just before being sentenced to death, when asked if there was any legal cause why judgment should not be pronounced, Petitioner replied (as the records before Judge Lemmon and now before this Court show): *"The defendant is absolutely innocent of these charges."* (Pet. Ex. 1, Jacket 3: Rep. Tr. of 6-25-48.) In his affidavit seeking to disqualify Judge Goodman, Petitioner swore: *"Affiant happens to be innocent of the Red Light Bandit crimes for which he was doomed."* (R. 108, Vol. I.)

The verified exhibits attached to Petitioner's application for declaratory relief in the District Court contain this plain language by Petitioner: " . . . *that he is absolutely innocent of the so-called Red Light Bandit crimes for which he was doomed.*" (R. 181, Vol. I.) As well, reference to earlier certiorari proceedings, including those coming from the Court of Appeals, and personally prepared by Petitioner, show that Petitioner never failed to swear to and hammer at the fact he *was* innocent.[9] (See, e.g.,

---

[9]Further, Petitioner has publicly stated: "Ever since my arrest I have begged for a lie-detector test on the question of guilt or innocence but I have never succeeded in being given one. . . . I want . . . to be questioned about whether I am the red light bandit. If

the third paragraph of the "Quaere" at the front of the petition and pp. 14-15 of the petition in No. 239 Misc., Oct. Term, 1953.)

In any event, guilt or innocence is not the determining legal factor, for this Court has wisely and soundly repudiated the dangerous doctrine that it may withhold the protection of constitutional safeguards merely as it may deem the litigant guilty or innocent. (*Hill v. Texas*, 316 U.S. 400, 406 ["Not the least merit of our constitutional system is that its safeguards extend to all—the least deserving as well as the most virtuous"].)

3. The record shows, as a matter of law, a personal, continuing and fixed bias on the part of Judge Goodman

---

the test reveals that I am lying, when I flatly and unequivocally state I am not that bandit and that I did not commit the crimes for which I am waiting to die, then I shall abandon my legal fight for survival." (*Cell 2455, Death Row*, by Caryl Chessman [New York: Prentice-Hall, Inc., 1954], pp. 279-280.) Throughout that book and in the subsequently published *Trial by Ordeal* (New York: Prentice-Hall, Inc., 1955), read in book or magazine form by literally millions of readers in this country and throughout the Western world, Petitioner emphasized his innocence and his futile efforts to be given a polygraph examination.

In the lead article in the March, 1955 issue of *Saga* Magazine, titled "What I Would Do With My Life" and authored by Petitioner, Petitioner stated: ". . . while admittedly I had been hijacking bookies and 'knocking over' collectors for a huge bookmaking syndicate in the area, I was *not* southern California's notorious Red Light Bandit." (Pp. 10-11.)

Nor are these merely the usual claims of "bum beef" by a desperate felon. The fact is that a nationwide controversy exists over Petitioner's guilt or innocence. (See, e.g., *True* Magazine, issue of October, 1956, the documented article "The Truth About The Man in Cell 2455, Death Row" by Wenzell Brown, p. 46 ["I do not believe Caryl Chessman is guilty of the crimes for which he was sentenced to death. I am convinced that he was framed"].) Moreover since the federal Courts cannot reach the question of guilt or innocence as such, Petitioner, his counsel and others are making continuing effort to establish Petitioner's innocence independent of court action.

against Petitioner and in favor of the State of California. Petitioner was consequently denied a fair trial before a fair tribunal, which this Court has held is a basic requirement of due process. Since, measured by the standards fixed by *In re Murchinson,* 349 U.S. 133, 136, *Berger v. United States,* 255 U.S. 22, and *Knapp v. Kinsey,* 232 F. 2d 458, 466, each of the facts there held to establish a disqualifying bias and prejudice are present here in even more aggravated form, Judge Goodman should have disqualified himself on the filing by Petitioner of his affidavit under 28 U.S.C. § 144.

The record before this Court shows that the remarks of Judge Goodman, his manner of handling the trial and pretrial hearings, his prejudgment of the case, his impatience, his figuratively stepping down from the bench to become advocate for Respondent, his baseless charge of bad faith leveled at one of Petitioner's counsel, and his evident hostility to both Petitioner and his counsel foreclosed even the semblance of a fair hearing.

Here Judge Goodman was personally embroiled and exercised (cf. *Offutt v. United States,* 348 U.S. 11); here, complaining because the case was in the federal Courts and referring to his Court as a laundry, he had an announced and determined intention to repudiate Petitioner and vindicate his position. Here he declared he didn't care what this Court intended; he was going to proceed in his own way. Here the intemperate language of his earlier opinion (128 F.Supp. 600), demanding rhetorically, "What must the citizen think of our 'nickel in the slot' administration of criminal justice?" gave judicial sanction to public hysteria and prejudice. By his actions and lan-

guage, Judge Goodman committed himself to a position from which he would not or could not retreat. His personal interest in the outcome of the case from that point was necessarily and patently "substantial." (See 28 U.S.C. § 455.)

Here, when the question of the propriety of his hearing the case was raised by Petitioner's counsel, Judge Goodman immediately took up the matter of Petitioner's proposed transfer to the San Francisco County Jail pending the hearing and said without qualification that Petitioner was entitled to the order and that he would make it. Thereafter, however, he refused to do so, even when counsel for Respondent joined in making the motion.

Petitioner filed his affidavit seeking Judge Goodman's disqualification at the earliest possible and practicable time. As soon as it became apparent to Petitioner that Judge Goodman still did entertain a personal, continuing and fixed bias and prejudice against him, and it further appeared that the facts of record were sufficient to establish that bias and prejudice as a matter of law, Petitioner immediately prepared and filed his affidavit. It was ordered stricken. As noted, no counter-affidavit was filed disputing the truth or the consequences of the facts set out therein. Further, disqualification would not have interfered with the regular hearing and disposition of the case.

4. This Court surely had no intention of ordering a meaningless hearing. But, as the record shows, that was the type of hearing accorded Petitioner in the District Court and sanctioned by the bare majority opinion of the Court of Appeals. Both Courts, without warrant, harshly

limited the mandate of this Court, and, in the language of *Remmer v. United States,* 350 U.S. 377, "unduly narrow[ed the] limits of the question." (Here, as in the *Remmer* case, the hearing judge was the Hon. Louis E. Goodman.) In this connection, it should be emphasized that this Court's opinion ordering the hearings makes specific reference to the "fraudulent transcript" as well as to fraud and collusion on the part of state agents.

Judge Hamley's October 18, 1956 opinion declares that Petitioner does not directly challenge the District Court's findings. In a fundamental, words-mean-what-they-say sense, Petitioner *does* directly challenge those findings; he attacks them *as a whole,* rather than piecemeal, for the reason that the hearing itself was so emasculated it furnished no valid or legal basis for the findings.

For example, Judge Goodman eulogistically found that "Fraser was exceptionally and specially competent to transcribe Perry's notes and did so with fairness and competently"—yet Judge Goodman had refused to permit Fraser's ability or the accuracy of the transcript to be tested, *whether this Court wanted it done or not,* and repeatedly held, "That is not an issue in this case," and Fraser "could have been the most incompetent reporter in the world and he could have made a mess of the transcript . . . and that does not raise any federal question."

Judge Goodman also found it was "not true that Fraser had been discharged at any time from his position as official Court reporter of Los Angeles County because of incompetency or drunkenness or for any other cause"—but Judge Goodman, at the same time, refused to arrange for the production of Los Angeles Superior Court Judge

Alfred E. Paonessa, by whom Petitioner offered to prove the contrary.

Judge Goodman further sweepingly found it was not true "that Fraser was inebriated or drunk or under the influence of alcohol or mentally or morally incapable of such work, at any of the times he was engaged in the work of transcribing Perry's notes"—although Judge Goodman had refused to permit the FBI and CII files, which showed Fraser's long arrest record for being drunk and *one arrest while he was supposedly actually engaged in preparing the record,* to be produced. Neither would Judge Goodman arrange for the arrest reports and logs of the Los Angeles Police Department (which had been secreted and kept from Petitioner's investigator) to be produced, although Petitioner was prepared to prove by them and the officers signing the reports that Fraser was repeatedly drunk during this period. Nor would Judge Goodman arrange for the production of Mrs. Eva Hoffman, by whom Petitioner offered to prove that at the very time Fraser was engaged in working on the transcript, he was so intoxicated as to be mentally and physically incapable of doing such work with any degree of competence. Judge Goodman refused as well to order the production of hospital records which would have revealed Fraser had a long and chronic addiction to alcohol, with inevitable brain damage, and which addiction culminated in 1953 in an attempt at suicide, severe delirium tremens, hallucinations the Mafia was after him, and lengthy hospitalization.

Judge Goodman additionally found that the deceased "Shorthand reporter Perry was not unable to properly record the trial proceedings . . ." This finding flies di-

rectly in the face of the letter from the Chairman of the Executive Committee of the Los Angeles Superior Court Reporters' Association: "Other reporters of our number have examined and studied Mr. Perry's notes and have reached the conclusion that many portions of the same will be found completely indecipherable because, toward the latter part of each Court session, Mr. Perry's notes show his illness." Nor would Judge Goodman arrange for the production of these named reporters, including the author of the letter.

Judge Goodman as well found that "The [disputed] instructions given by the trial judge on May 21, 1948 were correctly and accurately reported in the transcript as prepared by Fraser." But the only allowed direct testimony on these instructions *as transcribed from the notes* came from Respondent's own expert witness, who testified Perry's notes on these disputed instructions were "shattered" and that he could *not* read them. (Significantly, he also testified other portions of the notes were "skeletonized," "shattered" and "shattered clear out of recognition.") Judge Goodman refused to order or arrange for the production of named witnesses, including trial jurors (other than the two produced by Respondent), to establish that the prejudicial instruction was given and the comment made.

Petitioner could extend this showing for pages. He lost his case only because he was not allowed to present his proof. Judge Goodman's findings acquitting Leavy and Fraser of any connivance or collusion completely ignore the evidence they kept concealed the fact that Fraser was the uncle-in-law of Leavy; that if Judge Fricke had known that Fraser had talked with Detectives Forbes and Jones

out of Court, at the suggestion of Leavy, to reconstruct their testimony as prosecution witnesses at the trial, he would have raised the matter at the settlement, and also that if he had even heard the rumor of Fraser's alleged incompetence as a result of drunkenness he "would certainly have gone and made an investigation," etc.

Judge Goodman led Petitioner to believe that all the evidence he considered material would be produced, with or without specific statutory authority; he also assured counsel for Petitioner that all process for the production of witnesses would be afforded. (P.T.R. 20, Vol. II.) Yet a study of the record shows that the only witness, in addition to Leavy, Fraser and Judge Fricke, that Judge Goodman desired to hear was Judge Neeley (who, on learning he was to be called, suddenly remembered nothing: Resp. Ex. I for ident.), and it was he and he only whose production the Court offered to secure. (H.R. 525, Vol. VII.)

Every attempt by Petitioner in advance of and during the hearings to secure subpoenas for the production of, or to take the depositions of, his witnesses was denied by Judge Goodman. (R. 157, Vol. I; H.R. 552, Vol. VII, 913-914, Vol. X; see P.T.R. 243-249, Vol. III.) On December 30, 1955 Petitioner's counsel even raised the possibility of moving the place of hearing to Los Angeles if no other way was open to secure vital testimonial evidence (P.T.R. 209 et seq., Vol. III), and Judge Gooodman kept the matter hanging by stating: "I think there is some provision in the statute for bringing [in] witnesses from outside the district," but did not identify the provision. Again on January 9, 1956 Petitioner's counsel argued at length for the issuance of Court-ordered subpoenas. (P.T.R. 242-252, Vol. III.) On that same date Petitioner filed his "Pe-

titioner's Witness List and Application for Court Ordered Issuance of Subpoenas". (R. 151-153, Vol. I.) This application was denied without prejudice. (R. 157, Vol. I.)

Having made every effort prior to the hearings for process or arrangement to produce his witnesses and failing, Petitioner filed his "Motion for Order for Issuance of Subpoenas or Process for the Taking of Deposition..." on January 19, 1956 (R. 167, Vol. I), with supporting affidavit. (R. 160-166, Vol. I.) This motion, too, was denied (R. 215, Vol. I; H.R. 511, Vol. VII.) On January 24, 1956 Petitioner filed his motion for declaration of rights (R. 168-169, Vol. I), with supporting exhibits (R. 170-197) and affidavits (R. 198-203), by which he sought, among other things, to be able to pay the costs of producing his witnesses. (R. 201-202.) The application was summarily denied. (H.R. 916, Vol. X.)

This was a strange way of doing justice.

Further, here, as in *Adams v. United States*, 317 U.S. 269, Petitioner was denied the time and facilities for investigation and for the production of evidence; here, as there, it should be held that "evidence and truth are of no avail unless they can be adequately presented. Essential fairness is lacking if an accused cannot put his case effectively in Court."

Judge Hamley's opinion does not dispute that, at the prison prior to the hearings, all of Petitioner's legal papers were examined and their contents ascertained, or that Petitioner's person and effects were searched daily, often more than once, or that conversations between Petitioner and his counsel were listened to, or that all of the needless harassment and provocation which Petitioner and

his counsel were subjected, as detailed in the uncontradicted affidavits, is not true, or that Judge Goodman did not first state flatly he would change Petitioner's custody and then thereafter, even when counsel for Respondent joined in the motion for transfer of custody, refuse to grant the motion or enforce his *one* corrective order.

*Powell v. Alabama*, 287 U.S. 45, is, of course, the landmark case for the proposition that the right to be heard comprehends the right to the aid of counsel, the right to the *effective* aid of counsel, and the right to adequate time and opportunity to prepare. Both time *and* opportunity are demanded. (*Adams v. United States*, supra.) The issue cannot be settled by a mere reference to calendar days.

The condemned actions of Respondent's agents, state agents, in examining Petitioner's legal papers, and in being within hearing range during conferences between Petitioner and his counsel are, in legal contemplation, precisely the same as those which caused a reversal in *Coplon v. United States* (App. D.C.), 191 F. 2d 749, where it was recognized that there is no effective aid of counsel without private consultation. Refusal by the Respondent to provide adequate accommodations and reasonable conditions cannot override constitutional requirements.

Judge Goodman's attitude toward the case is again pointed up in his allowing J. Miller Leavy to appear—and actively and even at times theatrically participate—as one of the counsel for Respondent over the vigorous objections of counsel for Petitioner. That appearance served no useful purpose; it wrongly operated to keep Leavy from being excluded when other witnesses testified, particularly Stanley Fraser. The appearance was readily and wrongly

permitted even though Judge Goodman had full and prior knowledge Leavy was charged with fraud while acting as a state agent and that he would be a material witness at the hearing.

The prejudicial consequences of Judge Goodman's denial of Petitioner's motion to make the State of California a respondent is shown in the statement of facts. The Court of Appeals is in error in holding "that the state may not be joined as a party in [a habeas corpus] proceedings." In the past, in this case, in habeas corpus proceedings in the District Court, the Court of Appeals and this Court, such a joinder has been repeatedly sanctioned (see, e.g., 205 F. 2d 128, 340 U.S. 840, 341 U.S. 929, 346 U.S. 916).

The state *was* and is the real party in interest. Habeas corpus is *not* a suit against the state (*U. S. ex rel., Elliott v. Hendricks*, 213 F.2d 922). To have joined the state as a respondent, then, would not have made it a party to a *suit* in any legal sense of that word. It simply would have made it—and hence its officers and agents—a party to the proceeding, according judicial recognition to its actual real party in interest status.

The Court of Appeals holds that the District Court did not abuse its discretion in denying Petitioner's motion under 28 U.S.C. § 2250 to order the shorthand notes—a crucial part of the record, and offered in evidence at the first opportunity—photostated and furnished without cost to Petitioner, who was proceeding in forma pauperis. But the District Court, as the record shows, *refused* to exercise its discretion one way or the other, holding the section did not empower it to make such an order. The section, however, unmistakably does permit such an order, and

Petitioner was materially hampered in preparing his case by not having the notes.

The notes were impounded on December 16. The hearings were then scheduled to begin January 9. Petitioner's expert, as soon as they were available, began to study them. They were available only *at* the clerk's office and *when* that office was open, which gave Petitioner's expert only some 15 days in which to work, excluding week ends and the holidays. Petitioner had only a limited amount of funds. If he had paid the $300 to $400 required to have the notes photostated he would have been unable to pay his expert. As it was, his funds were soon exhausted and he was compelled to proceed in forma pauperis. As well, Petitioner was running out of time. His expert was not able to complete his study of the notes, around which the entire proceeding centered, unless they were available at nights and on week ends. (See P.T.R. 262-263, Vol. III.) They never were. In contrast, the state was able to pay its expert handsomely. And note that, even with a more than two week head start and under the most favorable conditions, that expert testified he "had to do something desperate" to complete his check of the notes against the transcript. He worked from December through January 8th, including Saturdays and Sundays, "right straight through." (H.R. 738-739, 744, Vol. IX.)

5. It is a curious situation when the Respondent here, a state agent, can arbitrarily keep Petitioner from property that belongs to him and thus prevent him from financing a Court fight to prove that other state agents are guilty of fraud. Indeed, the very purpose of Respondent's seizure of Petitioner's literary property was to force pauper status upon Petitioner through the use (and clear

abuse) of Respondent's naked power, and in this Respondent was entirely successful. Unless the age of the Police State is already with us, the public importance of resolving the issues tendered by Petitioner's application for declaratory relief could scarcely be more manifest. This is an instance where avoidance of the constitutional questions amounts to evasion (cf. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 75).

The District Court was clearly wrong in holding that it was without jurisdiction to declare Petitioner's rights. The language of 28 U.S.C. § 2201 expressly empowers "any Court of the United States . . . in a case of actual controversy within its jurisdiction . . . [to] declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought . . ." The section makes no exception of habeas corpus proceedings (and here, in that proceeding, the "actual controversy" was and is whether the death and other assailed judgments imposed by the California Courts are void or valid under the Federal Constitution). Neither does Rule 57, F.R.C.P., make such an exception, nor any case Petitioner has been able to find. Quite the contrary.[10]

---

[10]See Moore, *Commentary on the U.S. Judicial Code* (Matthew Bender & Co., 1949), p. 59, including footnotes 69-72 ["The declaratory judgment procedure operates like an 'expanded bill quia timet, meant to do in general what that suit did in its limited field.' In other words, by the creation of the new writ the area of adjudication is extended to cover any civil matter raising a justiciable case of controversy over which the federal courts have jurisdiction . . ."] In the federal courts, habeas corpus is a civil writ, *Ex parte Tom Tong*, 108 U.S. 556; *Cross v. Burke*, 146 U.S. 82; *Fisher ex rel. Barcelon v. Baker*, 203 U.S. 174. Here the District Court had Petitioner in its custody and possessed undoubted jurisdiction over the subject matter both as to the merits and the sought declaration of rights.

What the Court of Appeals, as well as the District Court, failed entirely to apprehend is that Petitioner did *not* seek declaratory relief under 28 U.S.C. § 2243 (the habeas corpus section). Rather, declaratory relief was expressly sought under 28 U.S.C. §§ 2201 and 2202 (the declaratory judgments sections). The latter application was simply ancillary to the former proceedings, and the general policy of the Courts, especially under the Federal Rules of Civil Procedure, has always favored a settlement of disputes between the same parties, concerning the same general subject matter, in one action.

Further, a favorable declaration of rights would not overturn any valid "security regulations" at the prison. Petitioner so alleged in his petition for habeas corpus to the California Supreme Court, summarily denied, and made a part of his application by being filed as a supporting exhibit. (R. 184, Vol. I.) Moreover, this is a question of fact on which Petitioner is entitled to a hearing. (See 28 U.S.C. § 2202.)

The California Supreme Court denied without opinion or hearing a petition for habeas corpus, seeking the same relief as was subsequently sought in the application for declaratory relief in the District Court. (R. 174-193, Vol. I.) Petitioner has no further remedy in the state Courts. He is civilly dead (California Penal Code, § 2602), and so is barred from instituting a civil suit in the Courts of California.

But there is no comparable provision for civil death in the federal statutes. Petitioner is resultantly free to obtain whatever relief to which he may be entitled under federal law and the Fourteenth Amendment in the federal Courts. What is ultimately in issue is whether the *acts*

of the Respondent warden in arbitrarily seizing and holding Petitioner's literary property and refusing to allow Petitioner to use the products of his mind to defray the costs of litigation and compensate counsel operate to deprive Petitioner of his property without due process of law and deny him the effective assistance of counsel. Significantly, Respondent does not claim the manuscripts held are not Petitioner's or that Respondent has any right to them or property right in them; Respondent, rather, simply used his power to seize them and then signified his intention to hold them until Petitioner was executed.

Federal Courts, fortunately, have both the clear power and duty to strike down state prison rules or conduct which, in their application to a state prisoner, seeking relief in the federal Courts, operate to deprive the prisoner of due process or equal protection of the law. (*Ex parte Hull*, 312 U.S. 546.)

Petitioner does have an enforceable legal right to his literary property as well as an enforceable legal right to use the products of his mind for the purposes stated. While Petitioner is civilly dead under state law, he expressly retains the right to "mak[e] and acknowledg[e] a sale or conveyance of property." (California Penal Code, § 2603.) Further, in this state, "No conviction of a crime works any forfeiture of any property . . ." (California Penal Code, § 2604.) And the Fourteenth Amendment commands that no state shall deprive any citizen of his property without due process of law, and here there has been no due process whatever but only a process involving the arbitrary employment by Respondent of his naked power.

## CONCLUSION AND PRAYER FOR WRIT.

Petitioner respectfully submits the Court should hold: (1) that Petitioner was constitutionally entitled to be personally present and allowed to participate in the Los Angeles Superior Court proceedings and trial at which the uniquely made-up reporter's transcript of the trial on the merits was created, settled and approved for use on the mandatory appeal; (2) that the state trial Court's order approving this challenged record must be set aside, as well as the California Supreme Court's affirmance of the judgments of conviction based upon it, and that a new determination of its validity and adequacy must be held in the Los Angeles Superior Court, with Petitioner allowed to participate therein personally and effectively; (3) that the findings of the District Court (because of the manner in which the truncated hearing was conducted and the demeanor of the judge before whom the hearing was held) are not determinative of the issue of fraud, and hence that that issue too should be resolved in the new Superior Court proceeding; (4) that, similarly, the holdings of the Court of Appeals (because of the position taken by the concurring judge in the bare majority opinion) are not controlling to any degree or in any respect upon the Superior Court proceeding; (5) that the District Court did have jurisdiction to entertain the application for declaratory relief under 28 U.S.C. §§ 2201 and 2202, and that if Petitioner sustains his allegations as set out in the application and supporting papers, he is constitutionally entitled to the relief there prayed for: that is, release of his unpublished novel and the right to use the products of his mind to defray the costs of litigation and to compensate counsel.

In this way, once and for all, the case may be resolved decisively and fairly.

To make a decision possible at this term of the Court and still give the Court ample time to deliberate, Petitioner and his counsel here stipulate that this petition may be treated as the brief for Petitioner normally filed following the granting of certiorari, and that the case may be decided upon it, respondent's brief in opposition and an answering brief by Petitioner, using the typewritten record. Counsel for Petitioner are prepared to argue the case immediately.

Wherefore, Petitioner prays that a writ of certiorari issue to the Court of Appeals for the Ninth Circuit in No. 15092, and that this Court reverse the judgment of the Court of Appeals with appropriate directions.

Dated, January 24, 1957.

Respectfully submitted,

GEORGE T. DAVIS,
*Attorney for Petitioner.*

CARYL CHESSMAN,
*Petitioner pro se.*

ROSALIE S. ASHER,
*Of Counsel.*

**(Appendix Follows.)**